SUBMITTED

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1927

No. [redacted] 57

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, PETITIONER,

vs.

WELLS-DICKEY TRUST COMPANY, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF ELMER E. ANDERSON, DECEASED

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

PETITION FOR CERTIORARI FILED APRIL 29, 1928

CERTIORARI GRANTED JUNE 1, 1928

(31,883)

(31,883)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 355

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 1, 1926

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State of Minnesota
In Supreme Court

STATE OF MINNESOTA — DISTRICT COURT
County of Hennepin — 4th Judicial District

2

WELLS DICKEY TRUST COMPANY, as Special Administrator of the Estate of ELMER E. ANDERSON, deceased, Plaintiff,

vs.

CHICAGO, BURLINGTON and QUINCY RAILROAD COMPANY, Defendant

ORDER

3

Upon all records and proceedings in said action and upon order of the court of Douglas county, the 7th Judicial District

It is hereby Ordered, that the Clerk of the above named Court may place said cause on for trial by jury October 23, 1922, at 10 o'clock in the forenoon.

Dated September 22, 1922.

By the Court,

G. W. BUTTINGTON,

Judge.

4 (Title of Cause)

7th Judicial District

COMPLAINT

Plaintiff, for its cause of action against said defendant, alleges:

I

That during all of the times herein mentioned, plaintiff was and is a corporation, duly organized, created and existing under and by virtue of the
5 laws of the state of Minnesota, as a Trust Company and by reason of the authority granted to it as such corporation it ever since has been and now is engaging in the business of establishing and maintaining a trust business in the City of Minneapolis, and elsewhere, that in connection with said business, it is authorized to act as trustee and personal representative for and on behalf of deceased persons, and their estates, that after the death of said Elmer E. Anderson and prior to the commencement of this action, such proceedings were duly had in the Probate Court in and for the
6 County of Hennepin, State of Minnesota, so that said Wells Fargo Trust Company, on the 2 day of Dec., 1921 was duly appointed Special Administrator of the Estate of said Elmer E. Anderson, deceased, and prior to the commencement of this action, duly qualified as such Special Administrator, and accepted the trust thereby created, and immediately entered upon the duties as such administrator, and now is acting as such administrator and brings this action as the personal representative of said deceased in the interest and

for the benefit of the heirs at law and next of kin 7
of said deceased.

II.

That said deceased at the time of his death was of the age of thirty one years; that he died intestate at Stanton, in the State of Iowa, on the 1st day of November, 1930; that said deceased, at the time of his death was a single man and left surviving him as his sole heirs at law and beneficiaries and next of kin, dependent upon him for support, the following persons, to wit Carolina Anderson, aged sixty one years, mother of said deceased, and Ada 8
C. Anderson, aged 31 years, sister of said deceased.

III.

Plaintiff further alleges that prior to its appointment as such Special Administrator, and on or about the 5 day of May, 1931, the mother of said deceased died, and that prior to her death, no action was brought or recovery had by the personal representative of said deceased, Elmer E. Anderson, for her benefit. That upon the death of said Carolina Anderson, mother of said Elmer E. An- 9
derson, the said Ada C. Anderson became and was left as the sole dependent next of kin of said Elmer E. Anderson.

IV.

Plaintiff further alleges that under the common law, as well as under the statute law of the State of Iowa, wherein said deceased Elmer E. Anderson died, said Ada C. Anderson, sister of said Elmer E. Anderson, was the next of kin

10 V.

Plaintiff further alleges that during all of said times, it was and is the statute law, as set out in the Code of Iowa, 1897, as follows, to wit:

"Section 3362. The personal property of the deceased, not necessary for the payment of debts, not otherwise, shall be distributed to the same persons and in the same proportions as though it were real estate."

"Share of Surviving Spouse dower. One third in value of all the legal or equitable estates in real
11 property, possessed by the husband at any time during the marriage, which have not been sold on execution or other judicial sale, and to which the wife had made no relinquishment of her right shall be set apart as her property in fee simple, if she survive him. The same share of real estate of a deceased wife shall be set apart to the surviving husband. All provisions made in this chapter in regard to the widow of a deceased husband shall be applicable to the surviving husband of a deceased wife."

12 "Section 3378 Descent to children. Subject to the rights and charges herein provided, the remaining estate of which the decedent died seized, shall, in the absence of a will, descend in equal shares to his children, unless one or more of them is dead, in which case, the heirs of such shall inherit his or her share in accordance with the rules herein prescribed, in the same manner as though such child had outlived its parents."

"Section 3379 Wife and Parents. If the in-

testate leaves no issue, one half the estate shall 13
go to his parents and the other half to the spouse;
if no spouse, the whole shall go the parents."

"Section 3380. Surviving Parent. If one of the parents is dead, the portion which would have gone to such deceased parents shall go to the survivor, including the portion which would have belonged to the intestate's spouse, had one been living."

"Section 3381. Heirs of Parents. If both parents are dead, the portion which would have fallen to their share by the above rules shall be disposed of in the same manner as if they had outlived the intestate and died in the possession of and ownership 14
of the portion thus falling to their share, and so on through ascending ancestors and their issue."

VI.

Plaintiff further alleges that prior to the death of plaintiff's intestate, Elmer E. Anderson, his father had died.

VII.

Plaintiff further alleges that during all of the times herein mentioned, the defendant, Chicago Burlington & Quincy Railroad Company was and 15
is a corporation, duly organized, created and existing under and by virtue of the laws of the state of Illinois as a railroad company, and as such owning, maintaining and operating a line and system of railroad extending through and between the states of Illinois, Iowa, Nebraska, Colorado, Minnesota and others unnecessary to be herein particularly mentioned, and that during all of said times, Stanton, in the State of Iowa, was a station

upon defendant's said line and system of railroad.

VIII.

Plaintiff further alleges that during all of said times, the defendant, in the operation of its said line and system of railroad was engaged in the business of commerce between the several states and territories of the United States and foreign countries as a common carrier by railroad and that at the time plaintiff's intestate was injured, as hereinafter alleged, and as a result of which injuries he died, he was in the employ of said defendant in its said business and commerce.

IX.

Plaintiff further alleges that on or about November 1st, 1929, the said Elmer E. Anderson was in the employ of said defendant in its said business as a fireman upon one of defendant's passenger trains, then being operated by it in its said business on said line and system of railroad at or near said Station, Iowa, and that while plaintiff's intestate was so employed and in the discharge of his duties as such fireman, defendant then and there so negligently and carelessly operated its said passenger train, its said line and system of railroad and other of its passenger trains and one of its freight trains, so that said different trains, or portions thereof, came into collision with each other, and so that all three trains were wrecked, and the track upon which plaintiff's intestate was employed as aforesaid was wrecked and derailed by reason of the negligence and carelessness of said defendant as hereinbefore alleged, while said train was there

ing at a high rate of speed, and as a result of said 19
wreck and derailment, all of which was due to the negligence and carelessness of defendant, plaintiff's intestate, said Elmer E. Anderson, was so severely and painfully injured, both externally and internally, so that he died as a result of said injuries on or about said November 1st, 1920, and that as a result of the injuries sustained by plaintiff's said intestate, he suffered grievous bodily and mental pain and anguish before he died.

X.

Plaintiff further alleges that at the time plain- 20
tiff's said intestate was injured, as hereinbefore alleged, he was a strong, healthy, able-bodied young man, aged thirty-one years, and earning and capable of earning the sum of approximately two hundred eighty ($280.00) dollars per month the greater portion of which he contributed to the support of his mother, Carolina Anderson, and his sister, said Ada C. Anderson, each of whom were dependent upon plaintiff's intestate.

XI

That by reason of the facts hereinbefore alleged, 21
plaintiff's intestate, and his said mother and sister, suffered and sustained general damages and pecuniary loss at the hands of said defendant in the sum of forty thousand (40,000.00) dollars, to recover which damages for the benefit of the said mother and sister of plaintiff's intestate, a cause of action has accrued to plaintiff as the personal representative of said Elmer E. Anderson, deceased.

22 Wherefore, plaintiff demands judgment against said defendant for the sum of forty thousand eighteen dollars, and for the costs and disbursements of this action.

TAUTGES, & WILDER and
ROBT. J. McDONALD,
Attorneys for Plaintiff,
726 S. McKnight Bldg.,
Minneapolis, Minnesota.

23 [illegible] In District Court.

STIPULATION

It is hereby stipulated and agreed by and between the parties of the above entitled action, that said action may be transferred to the District Court of Hennepin county, Fourth Judicial District, said state, for trial, and that said cause be placed on said calendar for trial for October 16th, 1922, in the said District Court of Hennepin county,

24 [illegible] Minnesota, for trial as a jury case, without the necessity of either party serving a notice of trial or a note of issue, and that the court may so order.

Dated September 16, 1922.

ROBT. J. McDONALD and
TAUTGES & WILDER
Attorneys for Plaintiff.

Dwinnell, McDermott, Sears & Weeks,
Attorneys for Defendant.

[Filed Sept. 22, 1922. Albert T. Olson, Clerk.]

(Title of Cause) 25

7th Judicial District

ORDER

Pursuant to the foregoing stipulation of the parties to the foregoing entitled action,

It is hereby ordered, that said action be transferred for trial to the District Court of Hennepin county, Fourth Judicial District, state of Minnesota, that the Clerk of the District Court of Hennepin county may place said cause on a jury calendar for trial the 16th day of October, 1922, as a jury case. That no notice of trial or note of issue 26
need be served or filed.

Dated September 23, 1922.

By the Court,

WILLIAM L. PARSONS,

Judge.

(Title of Cause) 4th Judicial District

AMENDED ANSWER

Now comes the defendant and for its amended answer to plaintiff's complaint herein 27

I

Admits that plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Minnesota, and was and now is engaged in the business of manufacturing and conducting a flour business in the City of Minneapolis and elsewhere.

II

Admits that on or about the 1st day of November, 1920, [illegible] Anderson aforesaid, was in the

28 employ of the defendant as a fireman and at said time said Elmer E. Anderson, deceased, and the defendant were engaged and engaging in interstate commerce.

Admits that said Elmer E. Anderson, deceased died on the 1st day of November, 1920, that Caroline Anderson, the mother of deceased, died on the 5th day of May, 1924, that Ada C. Anderson is a sister of the deceased.

IV.

Admits that the father of Elmer E. Anderson
29 deceased, died prior to November 1, 1920.

V.

Admits that on the 1st day of November, 1920, the said Elmer E. Anderson, deceased, while employed as a fireman on one of defendant's trains was killed in a wreck with another of defendant's trains at Stanton, Iowa, that the death of said Elmer E. Anderson occurred without the fault or negligence of the employees of the defendant.

VI

30 Further answering plaintiff's complaint and for further defense thereto the defendant alleges:

That on the 1st day of November, 1920, at the time of the death of Elmer E. Anderson, deceased, the said Elmer E. Anderson deceased, was a resident of Union County, state of Iowa, that Caroline Anderson, the mother of deceased, and Ada C. Anderson, sister of deceased, were residents of said county and state, that on the 11th day of January, 1921, said Ada C. Anderson acting as deceased's

Iowa, sitting in Probate a court having jurisdic- 31
tion of the matter, for an order appointing said
Ada C. Anderson, sister of deceased, General Ad
ministratrix of the Estate of said deceased; that
thereupon the said Ada C. Anderson duly filed in
said court a bond duly approved by said court and
otherwise fully qualified as General Administra
trix of the estate of said Elmer E. Anderson, de
ceased; that on the 14th day of March, 1921, the
District Court of said Union county, Iowa, sitting
in probate duly issued to said Ada C. Anderson let
ters of administration; that said Ada C. Anderson
is now and ever since said time has been the duly 32
appointed, qualified and acting general adminis
tratrix of the estate of Elmer E. Anderson de
ceased.

That the Probate Court of Hennepin county, Minnesota, at the time of the appointment of plain tiff as special administrator of the estate of El mer E. Anderson, deceased, had no authority or jurisdiction to make such appointment on account of the fact that the District court of Iowa in and for Union County, sitting in Probate, having juri diction of the estate of the deceased prior to said 33
time and on the 17th day of January, 1921, ap pointed Ada C. Anderson general administratrix of said estate, that this court is without juris dic tion and has no authority to hear and determine the cause of action, if any, set forth in the com plaint.

Except as herein before admitted, alleged or spe cifically denied, defendant denies each and every allegation, matter and thing in plaintiff's com

34 plaint contained and each and every part and portion thereof, whether as therein alleged or otherwise or at all.

Wherefore, defendant demands judgment that this action be dismissed and that it have and recover its costs and disbursements herein.

DONOHUE, MCDERMOTT, STEARNS & WEEKS,
Attorneys for Defendant,
801 Commerce Building,
St. Paul, Minnesota.

35 [Title of Cause] 4th Judicial District

REPLY

Plaintiff replying to the Amended Answer of the defendant herein

Denies each and every allegation, matter and thing set forth and contained in paragraph six of said amended answer.

Wherefore, plaintiff prays for judgment as demanded in its complaint.

TAUTGES & WILDER and
ROBERT J. MCDONALD,
36 Attorneys for Plaintiff,
[illegible] McKnight Bldg.,
Minneapolis, Minn.

[Title of Cause]

NOTICE OF MOTION FOR NEW TRIAL

To the above named Defendant, and the Messrs. Donohue, McDermott, Stearns & Weeks, Its Attorneys:

Take notice that the above named plaintiff, will

forthwith move the above named court, and the 37
Honorable W. W. Bardwell, Judge thereof, before whom said cause was tried, for an order vacating and setting aside the order heretofore made, dismissing said cause and granting a new trial thereof upon the following grounds, to wit:

1. Errors of law committed on the trial of said cause by which plaintiff was and is aggrieved, and to which plaintiff duly excepted.

2. The court erred in sustaining the objection of defendant to the taking of testimony in said 38
cause.

3. The court erred in granting defendant's motion to dismiss said cause.

4. The court erred in dismissing said cause.

5. The dismissal of said cause is contrary to law.

6. The dismissal of said cause is contrary to the evidence.

Said motion will be made and based upon all of 39
the files, records, pleadings and proceedings in said cause, and upon the settled case heretofore allowed and certified by the court.

Dated January 15th, 1923.

TAUTGES & WILDER and
ROBERT J. McDONALD,
Attorneys for Plaintiff,
736 McKnight Bldg.,
Minneapolis, Minn.

40 (Title of Cause)

ORDER DENYING MOTION FOR NEW TRIAL

The above entitled matter came duly on to be heard before the undersigned judge of said court, on the 24th day of January, A. D. 1923, on motion of plaintiff for an order, vacating and setting aside the order heretofore made, dismissing said cause, or for a new trial thereof.

Messrs. Tautges & Wilder, and Robert J. McDonald of Minneapolis, Minnesota, appeared for plaintiff in support of said motion.

41 Messrs. Donegre, McDermott, Stearns & Weeks, appeared as attorneys for defendant in opposition thereto.

The Court, having duly considered the matters involved in said motion,

It is hereby Ordered, that the same be, and hereby is in all things denied.

Dated January 24, 1923.

By the Court,

W. W. BARDWELL,

Judge.

Filed 1-25-23.

42

(Title of Cause)

JUDGMENT AND DECREE.

September 6, 1923.

The above entitled action having been regularly placed upon the calendar of the above named court for the September, A. D. 1923, General Term thereof, came on for trial before the court and a jury duly impaneled and sworn to try the same on

the 27th day of November, A. D. 1922, said cause 43
was partially tried defendant having in open court moved for the dismissal of the above entitled action, and the court, being fully advised in the premises, did, on the 27th day of November, A. D. 1922 duly make its order granting said motion.

Now pursuant to said order and on motion of Messrs. Denegre, McDermott, Stearns & Weeks, attorneys for defendant, it is hereby adjudged and decreed that the above entitled action be and the same is hereby dismissed, and

That the defendant recover of the plaintiff the 44
sum of nine dollars costs and disbursements as taxed and allowed herein.

$9.00.
vs pltf.

By the Court,
WALTER A. RYBERG,
Clerk of District Court
By GORDON J. MANGAN,
Deputy.

(Title of Cause) 45

NOTICE OF APPEAL TO THE SUPREME COURT

To the above named Defendant, to Messrs. Denegre, McDermott, Stearns & Weeks, Attorneys for the above named Defendant and to Walter A. Ryberg, Clerk of said District Court:

Please take notice that the above named plaintiff appeals to the Supreme Court of the State of Minnesota from that certain judgment of the said

46 District Court entered herein on the 6th day of September, A. D. 1923, in favor of said defendant for the sum of nine thousand dollars, said judgment being a judgment on the merits and for costs, and from the whole thereof.

Dated this 16th day of November, 1923.

TAUGES & WILDER and
ROBERT J. McDONALD,
Attorneys for Plaintiff.

Due and personal service of the within notice of appeal is hereby admitted at St. Paul, Minnesota, this 23rd day of November, A. D. 1923 and appeal bond is hereby waived.

47 DOERR, McDERMOTT, STEARNS & WEEKS,
Attorneys for Defendant.

Due and personal service of the within notice of appeal is hereby admitted at Minneapolis, Minnesota, this 26th day of November, A. D. 1923.

WALTER A. RYBERG,
Clerk of District Court of
Hennepin County, Minnesota.
By C. B. MAURER, Deputy.

48

Title of Cause.

SETTLED CASE.

This case came regularly on for trial before Hon. Winfield W. Bardwell, one of the judges of said court, with a jury, on the morning of November 27, 1922. Messrs. Tauges & Wilder and Mr. Robert J. McDonald appeared as attorneys for plaintiff and Messrs. Doerr, McDermott, Stearns & Weeks appeared as attorneys for defendant.

A jury was empaneled and sworn. 49

Mr. Tantgos stated the case for plaintiff to the jury.

Mr. Tantgos: Plaintiff's Exhibit A, which is a certified copy of the special letters of administration issued to the Wells Dickey Trust Company, is offered in evidence.

Mr. Stearns: No objection.

The Court: Received.

ADA C. ANDERSON,

sworn on behalf of plaintiff, testified:

By Mr. Tantgos: 50

Q. What is your full name?

Mr. Stearns: If the court please, the defendant objects to the taking of any testimony, and moves the court to dismiss this case on the grounds that the complaint does not state a cause of action. It appears conclusively from the pleadings that the deceased Anderson was in the employ of the defendant as a fireman, and that he and the defendant were engaged in interstate commerce on November 1, 1920, when Mr. Anderson was killed; 51
that he left surviving a mother, Caroline Anderson and a sister Ada Anderson; that his mother lived from the time of the death of Elmer Anderson until May 5, 1921, and then the mother died. It is admitted between the parties that the deceased, Anderson, was instantly killed and did not live any appreciable length of time. Under the admitted pleadings there can be no recovery in this case.

Recess until 2 P. M.

52 Afternoon session.

The Court: It seems to me that there was a vested right there which did not survive; that under the provisions of the Ohio case and the South Carolina case, in the absence of any statute, that they have adopted the same rule. If there was no dependent at the time of death at the expiration of six months, the only person for whose benefit the action might be brought does, and another party offers in evidence to be appointed. It hardly seems to be good reasoning that the cause of action would survive for that and not for the other. Except as I do it seems to me it would be rather absurd to pile up a record suit and then have to direct a verdict or set the verdict aside. If it is going to be determined, it should be determined upon this record. I think I will have to grant the motion. Motion granted and case dismissed.

53 Exception by plaintiff.

Stay of 60 days.

54 PLAINTIFF'S EXHIBIT "A."

State of Minnesota,

ss.

County of Hennepin.

Special Letters of Administration.

Whereas Dorcas Teigen applies to herein appointed Special Administratrix of the estate of Elmer L. Anderson, deceased.

Whereas, Hon. John A. Dahl, Judge of the Probate Court in the county of Hennepin and the seal

of the court, affixed the 27th day of December, 55
A. D. 1921.

By the Court,

JOHN A. DAHL,

Judge.

Probate Court Seal.

40633

State of Minnesota, Probate Court.

ss.

County of Hennepin.

I, James G. Kelso, clerk of the Probate Court, 56
within and for said county of Hennepin, and custodian of the seal and records of said court, do hereby certify that I have compared the foregoing copy of the record of the Special Letters of Administration, In the Matter of the Estate of Elmer L. Anderson, deceased, with the original records thereof now remaining in this office and have found the same to be correct transcripts therefrom, and of the whole of such original records. And I further certify that said exemplification would be re- 57
ceived in evidence in all the courts of the state of Minnesota.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Minneapolis, in said county this 27th day of November, A. D. 1922.

James G. Kelso,

Clerk of the Probate Court.

Probate Court Seal.

58 (Title of Cause).

STIPULATION

It is hereby stipulated and agreed by and between the parties to the foregoing entitled action, that the hereto attached transcript contains all of the evidence, proceedings, rulings, exceptions and exhibits except the complaint, amended answer and reply which may be referred to as a part of the record, had, taken and introduced upon the trial of said cause and that the same may be al-
59 lowed and certified by the court as the Settled Case and Bill of Exceptions herein.

Dated November 20th, 1922.

TAUTGES & WILDER and
ROBT. J. McDONALD,
Attorneys for Plaintiff.

DENEGRE, McDERMOTT, STEARNS & WEEKS,
Attorneys for Defendant.

60

(Title of Cause.)

ORDER ALLOWING AND CERTIFYING SETTLED CASE AND BILL OF EXCEPTIONS

The court having examined the hereto attached proposed Settled Case and Bill of Exceptions and the stipulation of the parties in reference thereto, and finding the same conformable to the truth,

It is hereby Ordered, that the same be and here 61
by is allowed as and for the Settled Case and Bill of Exceptions herein and the court certifies that said Proposed Settled Case and Bill of Exceptions contains all of the evidence, exhibits, proceedings, rulings and exceptions had taken and introduced upon the trial of said cause.

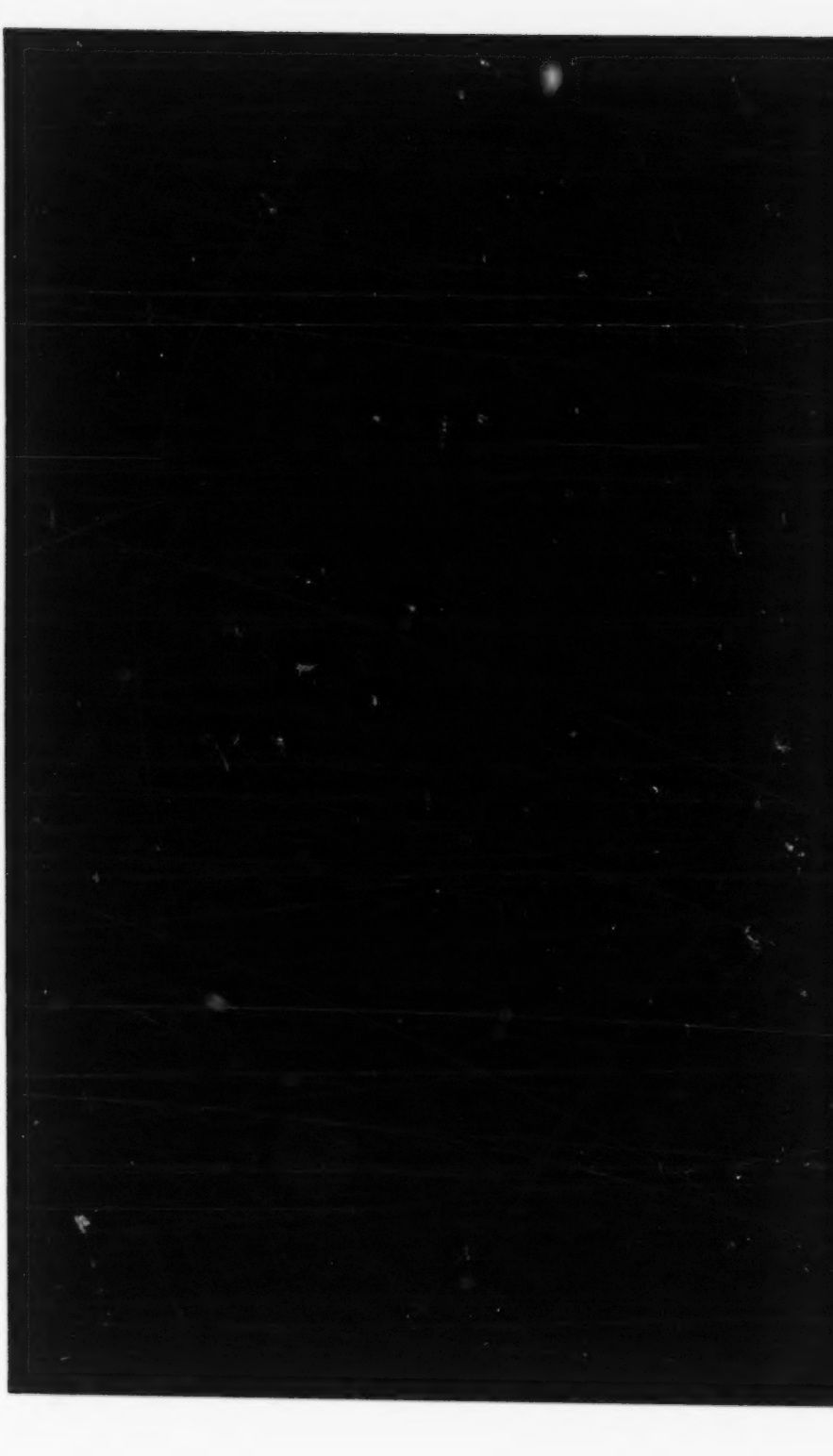
Dated December 23rd, 1922.

By the Court,

W. W. BARDWELL,

Judge.

62



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No. 167 Hennepin Co. Dibell, J. 1

Quinn, J. *dissent*

Endorsed
Filed May 29th, 1924.
Grace F. Kaercher,
Clerk.

2

Wells Dickey Trust Company, as Special Administrator, etc.

Appellant,

2348 —vs.—

Chicago, Burlington & Quincy Railroad Company,

Respondent.

SYLLABUS

3 The Federal Employers' Liability Act of April 22, 1908, 35 St. 65, c. 149, U. S. Comp. St. 1916, § 8657, creates in the personal representative of an employe killed by the negligence of a railroad company while employed in interstate commerce a right of action "for the benefit of the surviving widow or husband and children of such employe; and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe." Held, that the personal representative may recover where the deceased employe leaves no wife nor child, but leaves

4 ...ard Street, who died after his death, and [illegible] action brought; and a [illegible] sister who is the ward of [illegible] the recovery in such case being for the benefit of such [illegible] sister.

Judgment reversed.

OPINION

Action to recover damages for the death of the [illegible] plaintiff's intestate. There was judgment for the defendant and the plaintiff appeals.

The deceased, Ernest D. Anderson, was employed by the defendant as a [illegible] engineer. While so employed 5 he was killed on November 1, 1926, in the [illegible] of other employees of the defendant. He left [illegible] His father was dead. His mother survived him [illegible] May 9, 1931, prior to the commencement of this action. The deceased left a sister, Ada C. Anderson, [illegible] dependent upon him. Since the [illegible]

Upon these facts appeared the [illegible] deceased's action upon the ground that the decedent's mother, who survived him, was the sole beneficiary, and that upon her death there was no cause of action in the [illegible] to 6 accrue to the benefit of a [illegible] beneficiary.

We reach a different conclusion [illegible] the [illegible] weight of authority accords with the trial court's holding.

The Federal Employer's Liability Act of April [illegible] 1908, 35 St. at L. 65, U. S. Comp. St. 1916, § 8657, so far as here material, is as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several states . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce or, in case of death of such employé, to his

or his personal representative, for the benefit of the surviving widow or husband and children of such employe, and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe." 7

The statute creates in the personal representative of the deceased employe a new right of action, one unknown to the common law, attended by a measure of damages strange to the old law but appropriate to the newly created right enforceable by the representative for the benefit of designated beneficiaries. Michigan Cent. R. Co. vs. Vreeland, 227 U. S. 59; American &c. Co. vs. Didrickson, 227 U. S. 145; Gulf &c. R. Co. vs. McGinnis, 228 U. S. 173; 8
North Carolina &c. R. Co. vs. Zachary, 232 U. S. 248; Garrett vs. Louisville &c. Ry. Co., 235 U. S. 308. The statute is not properly a survival statute. The amendment of April 5, 1910, 36 St. 291, c. 143, § 9, U. S. Comp. St. 1916, § 8665, is the survival statute.

The widow having died since the employe's death the question is whether his personal representative may maintain an action for the benefit of a remoter beneficiary. It is one of construction and is ultimately a federal one. It has not been decided, so far as we are advised, by either a federal or a state court. There are constructions of state 9
statutes, variant in their language and policy, helpful in the consideration of the federal act.

In Hammond vs. Lewiston &c. Ry. Co., 106 Me. 209, involving a statute of that state and a situation not substantially different from that before us, it is held that the widow having died there was no cause of action in the representative for the benefit of other beneficiaries. The same is held in Sanders vs. Louisville &c. R. Co., 111 Ved. 508, and Railroad vs. Bean, 94 Tenn. 388, both construing the Ten-

10 nessee statute; in Dillier vs. Cleveland &c. R. Co. 34 Ind. App. 52, construing a statute of Indiana similar to the federal statute; and in Woodward vs. Chicago &c. R. Co. 23 Wis. 400.

That there may be a recovery in situations like that presented here is held in Garrad vs. Mahoning Valley R. Co. 108 Ohio St. 212, and Morris vs. Spartanburg &c. R. Co., 70 S. C. 279. The Ohio statute creates an action in the representative "for the exclusive benefit of the wife, or husband, and children, or if there be neither of them, then of the parents and next of kin of the person whose death

11 was so caused." In the Ohio case, the latest one called to our attention, the husband and wife were killed in a common accident, the wife surviving the husband by a few hours. The suit was by the administrator of the husband for the benefit of his parents and next of kin. Holding the action maintainable, the court said:

> "We think that our statute does not vest the cause of action in any particular class existing at that time, but that the cause of action, or the right to enforce liability, is distinctly vested in the personal representative of the deceased person in behalf of the class existing when the right is enforced by suit instituted by

12 such representative."

The South Carolina statute creates a right of action in the representative "for the benefit of the wife or husband and child or children of the person whose death has been so caused; and if there be no such wife or husband, or child or children, then, for the benefit of the parent or parents, and if there be none such, then for the benefit of the heirs at law or the distributees of the person whose death shall have been caused, as may be dependent on him for support." In the South Carolina case the action was brought by the

father of the deceased as his administrator. The deceased 13
left no wife or child. The father, the sole beneficiary, died pending the action and before trial. The court, holding that the action did not abate and that a recovery could be had for the benefit of the remoter class, said:

> "We think it would be too narrow a construction of the statute to hold that an action thereunder could abate as long as any beneficiary, person or class named in the statute existed. In this case, while it is true that the father would have been sole beneficiary in the event of his being alive at the time of recovery of damages, still the statute had other beneficiaries in contemplation in the event of his death. The brothers and 14
> sisters of the deceased named in the complaint are his heirs at law, and since they fall within the class of beneficiaries, while the action is still pending, the action should not abate for want of a statutory beneficiary. Under the statute, the action must be prosecuted in the name of the deceased's administrator, and he is living to carry on the action for the benefit of whoever may be entitled to participate in the distribution of such recovery as may be had."

The statutes of the different states vary in terms. In some a right of action is vested in an individual beneficiary or in a class of beneficiaries. The federal act vests it in the personal representative of the deceased. Suit is sometimes brought in the name of the beneficiary. Under the Federal act the beneficiary cannot sue. American &c. Co. vs. Birch, 224 U. S. 547; Pittman vs. St. Louis &c. R. Co., 188 F. 842. Under some statutes, indeed under a great many, it is held that the beneficiary takes a property right which passes upon his death as personal property. Under such a statute a remoter beneficiary of course cannot take. It is not claimed that the Federal act gives an inheritable right to a beneficiary. What is said in cases construing

16 such statutes is not very helpful here. Under other statutes it is held that the right of action vesting in the personal representative abates upon the death of the beneficiary or class of beneficiaries first entitled to take and living at the death of the employe and those in remoter class do not take. That is the contention of the defendant here. Cases involving the question discussed and many collateral ones are collected in 13 A. L. R. 225; 17 C. J. 1252; 8 R. C. L. 794; note 17 Ann. Cas. 773; Tiffany Death by Wrongful Act, § 80, et seq.

17 It may be noted that the Tennessee, Indiana and Wisconsin courts held the statutes under construction in the cases cited in derogation of common law and subject to strict construction. The construction placed by the Supreme Court upon the Federal act is not narrow or restricted. It has been held that the act is remedial and should have a liberal construction in advancement of the remedy. St. Louis &c. R. Co. vs. Conley, 187 F. 949; Behrens vs. Illinois Cent. R. Co., 192 F. 581; McNamara vs. Washington &c. Co., 37 App. D. C. 384; Baltimore &c. Co. vs. Branson, 128 Md. 678; Horton vs. Oregon &c. N. Co., 72 Wash. 503. There are many other cases of like effect. In Johnson vs. Southern Pac. R. Co., 196 U. S. 1, it was held that the Safety Appliance Act, aside from its penal provisions, was remedial in character, and should be accorded a fair construction to accomplish the results intended.

18 The Safety act was intended to change the common law and substitute what Congress deemed a more just legal relation between railroad employer and employe. Congress thought it wise to vest, in case of the employe's death, a right of action in his personal representative for the ben-

fit of relatives likely interested in the continuance of his life 19
and designated three classes. The statute represents Congressional policy. Liability is not imposed upon the carrier as a penalty. But when injury comes the carrier must pay upon the basis of the newly established rules, and if death ensues, dependents must be compensated to the extent determined by the statute. It is not thought that Congress had in mind that if the first named beneficiary died after the death of the employe a remoter beneficiary should not take and the carrier should be discharged of liability. It did not wish such result; and it is a fair construction that one class failing after the employe's death the cause of action resting 20
in the representative may be prosecuted for the benefit of the next class.

We do not stress much the doctrine of liberal construction, but does the holding of the Tennessee, Indiana and Wisconsin courts as to strict construction militate greatly against the results there reached. Likely the holding in those states would have been the same if the doctrine of strict construction had not been mentioned. The common law was radically changed by the liability statute. The statute was intended for the protection of the employe and his dependents. It inaugurated a new policy. It should 21
have a fair construction, with the purpose of its enactment in view, not narrowed or restricted because it is a substitute for the discarded common law. The new law should be given a reasonable construction to the end that interstate employes and their dependents may be compensated, for that was the purpose of Congress.

Under our death by wrongful act statute, Ch. S. 1913, § 8176, the question before us cannot arise. It can arise under our Railway Employers' Liability Act, Laws 1915,

22 c. 187, as amended by Laws 1923, c. 333, which is couched in the language of the Federal act. Both should have the same construction. If our statute were to be construed now we would hold that the liability of the employer continues from class to class of beneficiaries upon a preceding class becoming non-existent through the death of its members after the death of the employe. The amount of damages recoverable may change but the liability continues. Without a federal holding we construe the Federal act as we would construe our statute.

Judgment reversed.

23 Dissent. The act creates but a single cause of action, which vests in the preferred beneficiary immediately upon the death of the employe. In the instant case, the mother was the sole beneficiary in the preferred class. She died May 5, 1921, six months subsequent to the death of the employe, without attempting the enforce her cause of action. In my opinion, the cause of action died with her. Under this statute the surviving dependent relative acquires a right of action at the time of the death of the employe or not at all.

24

TRANSCRIPT OF JUDGMENT

25

WELLS DICKEY TRUST COMPANY, a Corp., as Special Administrator of the Estate of Elmer E. Anderson, Deceased,

Appellant,

23918 —VS.—

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,

Respondent

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that 26
the Judgment of the Court below, herein appealed from, to wit, of the District Court within and for the County of Hennepin, be and the same hereby is in all things Reversed.

And it is further determined and adjudged that Appellant herein, do have and recover of Respondent, herein the sum and amount of Seventy six and 25 100 Dollars ($76.25) costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed June 13, A. D. 1924.

BY THE COURT.

Attest: 27

GRACE F. KAERCHER,

Clerk.

STATEMENT FOR JUDGMENT

Statutory costs, $25.00.
Printer, $36.25.
Clerk, $10.00.
Return, $5.00.
Total, $76.25.

28 STATE OF MINNESOTA
SUPREME COURT } ss.

I, Grace F. Kaercher, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at the Capitol, in the City of St. Paul, June 13, A. D. 1924.

GRACE F. KAERCHER,
Clerk.

29 By PETER O. SCOW,
Deputy.

(SEAL)

24936

State of Minnesota
In Supreme Court

WELLS-DICKEY TRUST COMPANY, as Special Administrator of the Estate of ELMER E. ANDERSON, deceased.

Respondent,

vs.

CHICAGO, BURLINGTON, and QUINCY RAILROAD COMPANY,

Appellant.

RECORD

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and
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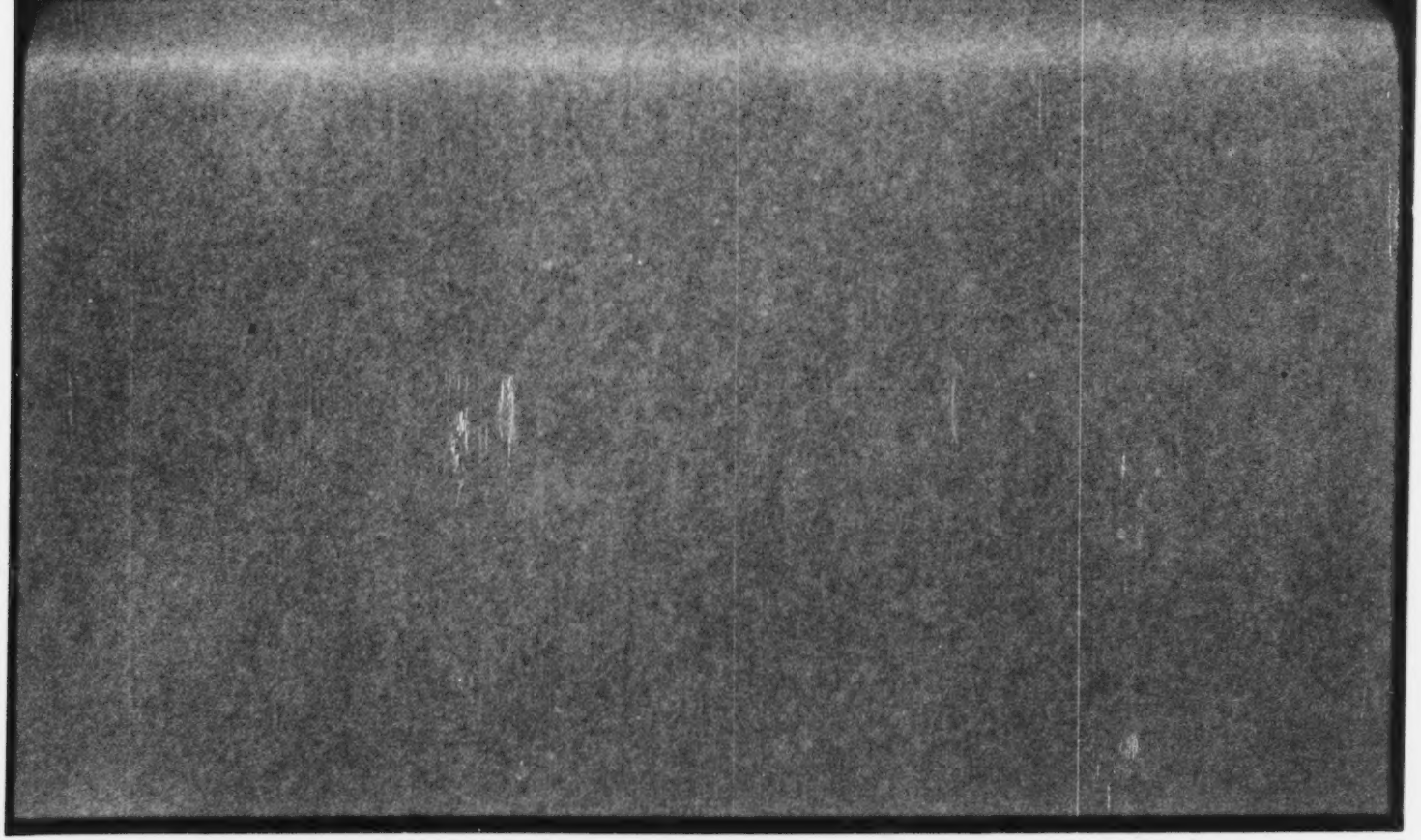

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State of Minnesota
Supreme Court

STATE OF MINNESOTA, DISTRICT COURT,
County of Hennepin, Fourth Judicial District

WELLS DICKEY TRUST COMPANY, as Special Administrator of the Estate of ELMER E. ANDERSON, deceased,

Plaintiff,

vs.

CHICAGO, BURLINGTON, and QUINCY RAILROAD COMPANY,

Defendant.

COMPLAINT.

Plaintiff, for its cause of action against said defendant, alleges:

I

That during all of the times herein mentioned, plaintiff was and is a corporation duly organized, created and existing under and by virtue of the laws of the state of Minnesota, as a Trust Com-

State of Minnesota
Supreme Court

STATE OF MINNESOTA, DISTRICT COURT,
County of Hennepin, Fourth Judicial District

2

WELLS-DICKEY TRUST COMPANY, as Special Administrator of the Estate of ELMER E. ANDERSON, deceased,

Plaintiff,

vs.

CHICAGO, BURLINGTON, and QUINCY RAILROAD COMPANY,

Defendant.

COMPLAINT.

3

Plaintiff, for its cause of action against said defendant, alleges:

I

That during all of the times herein mentioned, plaintiff was and is a corporation duly organized, created and existing under and by virtue of the laws of the state of Minnesota, as a Trust Com-

4 ...ions and by reason of the authority granted to it as such corporation, it ever since has been and now is engaging in the business of conducting and maintaining a trust business in the City of Minneapolis, and elsewhere, that in connection with its business it is authorized to act as trustee and personal representative for and in behalf of deceased persons and their estates; that after the death of said Elmer E. Anderson and prior to the commencement of this action, such proceedings were duly had in the Probate Court in and for the 5 County of Hennepin, State of Minnesota, so that said Wells-Dickey Trust Company on the 27th day of Dec., 1921, was duly appointed Special Administrator of the Estate of said Elmer E. Anderson, deceased, and prior to the commencement of this action duly qualified as such Special Administrator and accepted the trust thereby created, and immediately entered upon its duties as such administrator, and now is acting as such administrator and brings this action as the personal representative of said deceased in the interest and 6 for the benefit of the heirs at law and next of kin of said deceased.

II

That said deceased at the time of his death was of the age of thirty-one years; that he died in Iowa City, Johnson County, Iowa, on the 1st day of November, 1920; that said deceased, at the time of his death was a single man and left surviving him as his sole heirs at law and next of kin

and next of kin, dependent upon him for support, 7
the following persons, to-wit: Carolina Anderson, aged sixty one years, mother of said deceased, and Ada C. Anderson, aged 31 years, sister of said deceased.

III.

Plaintiff further alleges that prior to its appointment as such Special Administrator, and on or about the 5th day of May, 1921, the mother of said deceased died, and that prior to her death, no 8
action was brought or recovery had by the personal representative of said deceased, Elmer E. Anderson, for her benefit. That upon the death of said Carolina Anderson, mother of said Elmer E. Anderson, the said Ada C. Anderson became and was left as the sole dependent next of kin of said Elmer E. Anderson.

IV.

Plaintiff further alleges that under the common law, as well as under the statute law of the State of Iowa, wherein said deceased Elmer E. Anderson 9
died, said Ada C. Anderson, sister of said Elmer E. Anderson was his next of kin.

V.

Plaintiff further alleges that during all of said times, it was and is the statute law, as set out in the Code of Iowa, 1897, as follows, to-wit:

"Section 3362. The personal property of the deceased, not necessary for the payment of debts,

10 nor otherwise, shall be distributed to the same persons and in the same proportions as though it were real estate."

"Share of Surviving Spouse-dower. One third in value of all the legal or equitable estates in real property, possessed by the husband at any time during the marriage, which have not been sold on execution or other judicial sale, and to which the wife had made no relinquishment of her right shall be set apart as her property in fee simple, if she survive him. The same share of real estate of a
11 deceased wife shall be set apart to the surviving husband. All provisions made in this chapter in regard to the widow of a deceased husband shall be applicable to the surviving husband of a deceased wife."

"Section 3378. Descent—to children. Subject to the rights and charges herein provided, the remaining estate of which the decedent died seized, shall, in the absence of a will, descend in equal shares to his children, unless one or more of them is dead, in which case, the heirs of such shall in-
12 herit his or her share in accordance with the rules herein prescribed, in the same manner as though such child had outlived its parents."

"Section 3379. Wife and Parents. If the intestate leaves no issue, one-half the estate shall go to his parents and the other half to the spouse; if no spouse, the whole shall go to the parents."

"Section 3380. Surviving Parent. If one of the parents is dead, the portion which would have gone to such deceased parents shall go to the sur-

vivor, including the portion which would have be- 13
longed to the intestate's spouse, had one been living."

"Section 3381. Heirs of Parents. If both parents are dead, the portion which would have fallen to their share by the above rules shall be disposed of in the same manner as if they had outlived the intestate and died in the possession of and ownership of the portion thus failing to their share, and so on through ascending ancestors and their issue."

14

VI.

Plaintiff further alleges that prior to the death of plaintiff's intestate, Elmer E. Anderson, his father had died.

VII.

Plaintiff further alleges that during all of the times herein mentioned, the defendant, Chicago, Burlington & Quincy Railroad Company was and is a corporation, duly organized, created and ex- 15
isting under and by virtue of the laws of the state of Illinois as a railroad company, and as such owning, maintaining and operating a line and system of railroad extending through and between the states of Illinois, Iowa, Nebraska, Colorado, Minnesota and others unnecessary to be herein particularly mentioned, and that during all of said times, Stanton, in the State of Iowa, was a station upon defendant's said line and system of railroad.

16 Plaintiff further alleges that during all of said times, the defendant, in the operation of its said line and system of railroad was engaging in the business of commerce between the several states and territories of the United States and foreign countries as a common carrier by railroad and that at the time plaintiff's intestate was injured, as hereinafter alleged, and as a result of which injuries he died, he was in the employ of said defendant in its said business and commerce.

17 IX

Plaintiff further alleges that on or about November 1st, 1920, the said Elmer E. Anderson was in the employ of said defendant in its said business as a fireman upon one of defendant's passenger trains, then being operated by it in its said business on said line and system of railroad at or near said Stanton, Iowa, and that while plaintiff's intestate was so employed and in the discharge of his duties as such fireman, defendant then and there
18 so negligently and carelessly operated its said passenger train, its said line and system of railroad another of its passenger trains and one of its freight trains, so that said different trains, or portions thereof, came into collision with each other, and so that all three trains were wrecked, and the train upon which plaintiff's intestate was employed as aforesaid was wrecked and derailed by reason of the negligence and carelessness of said de-

fendant as hereinbefore alleged, while said train 19
was moving at a high rate of speed, and as a result of said wreck and derailment, all of which was due to the negligence and carelessness of defendant, plaintiff's intestate, said Elmer E. Anderson, was so severely and painfully injured, both externally and internally, so that he died as a result of said injuries on or about said November 1st, 1920, and that as a result of the injuries sustained by plaintiff's said intestate, he suffered grievous bodily and mental pain and anguish before he died.

20

X.

Plaintiff further alleges that at the time plaintiff's said intestate was injured, as hereinbefore alleged, he was a strong, healthy, able bodied young man, aged thirty-one years, and earning and capable of earning the sum of approximately two hundred eighty ($280.00) dollars per month, the greater portion of which he contributed to the support of his mother, Carolina Anderson, and his sister, said Ada C. Anderson, each of whom were 21
dependent upon plaintiff's intestate.

XI.

That by reason of the facts hereinbefore alleged, plaintiff's intestate, and his said mother and sister, suffered and sustained general damages and pecuniary loss at the hands of said defendant in the sum of forty thousand ($40,000.00) dollars, to recover which damages for the benefit of the said

22 mother and sister of plaintiff's intestate, a cause of action has accrued to plaintiff as the personal representative of said Elmer E. Anderson, deceased.

Wherefore, plaintiff demands judgment against said defendant for the sum of forty thousand ($40,000.00) dollars, and for the costs and disbursements of this action.

TAUTGES & WILDER and
ROBT. J. McDONALD,
Attorneys for Plaintiff.
23 726 S. McKnight Bldg.,
Minneapolis, Minnesota.

(Title of Cause.)

AMENDED ANSWER

Now comes the defendant and for its amended answer to plaintiff's complaint herein:

I.

24 Admits that plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Minnesota, and was and now is engaged in the business of maintaining and conducting a trust business in the City of Minneapolis and elsewhere.

II

Admits that on or about the 1st day of November, 1920, Elmer E. Anderson, deceased, was in the

employ of the defendant as a fireman and at said 25
time said Elmer E. Anderson, deceased, and the defendant were engaged and engaging in interstate commerce.

Admits that said Elmer E. Anderson, deceased, died on the 1st day of November, 1920; that Carolina Anderson, the mother of deceased, died on the 5th day of May, 1921; that Ada C. Anderson is a sister of the deceased.

IV.

Admits that the father of Elmer E. Anderson, 26
deceased, died prior to November 1, 1920.

V.

Admits that on the 1st day of November, 1920, the said Elmer E. Anderson, deceased, while employed as a fireman on one of defendant's trains was killed in a wreck with another of defendant's trains at Stanton, Iowa; that the death of said Elmer E. Anderson, deceased, was caused by the negligence of the employes of the defendant.

27

VI.

Further answering plaintiff's complaint and for further defense herein the defendant alleges:

That on the 1st day of November, 1920, at the time of the death of Elmer E. Anderson, deceased, the said Elmer E. Anderson, deceased, was a resident of Union county, State of Iowa; that Carolina Anderson, the mother of deceased, and Ada C. Anderson, sister of deceased, were residents of

said county and state; that on the 17th day of January, 1921, said Ada C. Anderson, sister of deceased, petitioned the District Court of Union county, Iowa, sitting in Probate, a court having jurisdiction of the matter, for an order appointing said Ada C. Anderson, sister of deceased, General Administratrix of the Estate of said deceased; that thereupon the said Ada C. Anderson duly filed in said court a bond duly approved by said court and otherwise fully qualified as General Administratrix of the estate of said Elmer E. Anderson, deceased; that on the 14th day of March, 1921, the District Court of said Union county, Iowa, sitting in probate duly issued to said Ada C. Anderson letters of administration; that said Ada C. Anderson is now and ever since said time has been duly appointed, qualified and acting general administratrix of the estate of Elmer E. Anderson, deceased.

That the Probate Court of Hennepin county, Minnesota, at the time of the appointment of plaintiff as special administrator of the estate of Elmer E. Anderson, deceased, had no authority or jurisdiction to make such appointment, on account of the fact that the District Court of Iowa in and for Union county, sitting in probate, having jurisdiction of the estate of the deceased prior to said time and on the 17th day of January, 1921, appointed Ada C. Anderson general administratrix of said estate, that this court is without jurisdiction and has no authority to hear and determine

the cause of action, if any, set forth in the com- 31
plaint.

Except as hereinbefore admitted, alleged or specifically denied, defendant denies each and every allegation, matter and thing in plaintiff's complaint contained and each and every part and portion thereof, whether as therein alleged or otherwise or at all.

Wherefore, defendant demands judgment that this action be dismissed and that it have and recover its costs and disbursements herein.

DENEGRE, McDERMOTT, STEARNS & WEEKS, 32
Attorneys for Defendant,
901-6 Commerce Building,
St. Paul, Minnesota.

(Title of Cause.)

REPLY.

Plaintiff replying to the Amended Answer of the defendant herein

Denies each and every allegation, matter and 33
thing set forth and contained in paragraph six of said amended answer.

Wherefore, plaintiff prays for judgment as demanded in its complaint.

TAUTGES & WILDER and
ROBERT J. McDONALD,
Attorneys for Plaintiff,
726 S. McKnight Bldg.,
Minneapolis, Minn.

34 (Title of Cause.)

SETTLED CASE.

This action came on for trial before Hon. Paul W. Guilford, Judge, at the court house in the City of Minneapolis, Minnesota, on November 25, 1924, at 10 o'clock a. m.

Jury was impaneled and after examination a trial jury was secured and sworn to try the action. The following proceedings were had:

35

ADA C. ANDERSON,

being duly sworn in behalf of plaintiff, testified as follows, examined by Mr. Miner:

Q. What is your name?

Mr. Stearns: The defendant now objects to the taking of any testimony and moves the Court to dismiss this action on the ground that it appears from the pleadings conclusively that the parties, at the time of the death of Anderson, were engaged in interstate commerce under the Federal
36 Employers' Liability Act; it appears that deceased left no widow or children of the first class of beneficiaries but did leave a mother, who survived him, that prior to the commencement of this action the mother died. It appears from the pleadings, therefore, that the cause of action, if any, vested in the mother and her personal representative and can not be maintained by this plaintiff for the benefit of the sister, of the third class of beneficiaries.

The Court: Objection is overruled. 37

Mr. Stearns: Exception.

A. Ada C. Anderson.

Mr. Miner:

Q. Your age is what?

A. At the present time?

Q. Yes.

A. 33 years old.

Q. You were a sister of Elmer C. Anderson,—what was his name?

A. Elmer E. Anderson.

Q. Elmer E. Anderson? 38

A. Yes, sir.

Q. And at the time that he received these injuries resulting in his death where were you living?

A. At home, at Creston, Iowa, with my mother and brother.

Q. And at the time that he received these injuries who composed the members of your family?

A. My mother, my brother and myself.

Q. That is, this brother, Elmer E. Anderson, who was killed? 39

A. Yes, sir.

Q. And at that time your mother was of what age?

A. 62 years.

Q. And at the time that the brother met with this accident, what was his age?

A. He was 31 years and 8 months and some days, I don't just recall.

Q. Do you know about how long he had been

40 engaged in railroad service at the time that he met with this accident?

A. Well, he was a fireman, I know, for 8 years, and prior to that he worked in some other capacity for the railroad, for the Burlington.

Q. So that for more than 8 years he had been in the employ of the railroad?

A. Yes, sir.

Mr. Stearns:

Q. You mean the Burlington, he had been in the employ of the Burlington?

41 A. Yes, sir.

Mr. Miner:

Q. At the time that he met with this accident, for how long had you been living in this same home at that time?

A. 3 years and 8 months, about.

Q. And prior to the 3 years and 8 months that you speak of, where had you been?

A. In Chicago.

Q. And what were you doing in Chicago?

A. Employed.

42 Q. Working for wages?

A. Yes, sir.

Q. Supporting yourself?

A. Yes, sir.

Q. About what time did you leave the home at Creston to go to Chicago?

A. After my mother's death in the fall—

Q. No, no, the first time, I mean, when you first went to Chicago.

A. Well, I think it was 1910 or 1911.

Q. And at that time who composed the mem- 43
bers of the family at home?

A. My father, mother, two brothers and sister and myself.

Q. And the two brothers, that included this brother, Elmer E. Anderson, who was killed?

A. Yes, sir.

Q. And for how long were you absent from the home at that time, during what period of time?

A. About 6 years.

Q. And then about 3 years and 8 months be- 44
fore the brother met with this accident, did he come to Chicago to see you?

A. Yes, sir.

Q. And did he see you at that time?

A. Yes, sir.

Q. Who was with him when he came to Chicago, if any one?

A. My sister that is now deceased.

Q. And what was her age at that time?

A. She was 16 years old.

Q. She was 16 and you were a little older than she was?

45

A. Yes, sir.

Q. The brother and this sister saw you in Chicago?

A. Yes, sir.

Q. Where?

A. At the place where I was staying; they stayed there while they were on their visit there, their trip.

Q. You mean at some boarding place?

46 A. No, with a lady I was living with, Mrs. Le Clair.

Q. At the place where you made your home while you were in Chicago?

A. Yes, sir.

Q. Who was present at the time that your brother saw you at Mrs. Le Clair?

A. Mrs. Le Clair, and my sister, brother and myself.

Q. Then the four of you were present?

A. Yes, sir.

47 Q. State what, if anything, was said between you and your brother on that occasion with reference to your returning home.

Mr. Stearns: Objected to as incompetent, immaterial and irrelevant; incompetent as it tends to prove the statement of a deceased person regarding a future contract or mode of living.

The Court: Objection overruled.

Mr. Stearns: Exception.

Mr. Miner:

Q. I will change the form of the question. Did
48 you have some talk with your brother at that time in the presence of Mrs. Le Clair and the sister?

A. Yes, sir.

Q. And as a result or after this talk with the brother did you still continue in Chicago?

A. No, sir, I left for my home.

Q. What did you do afterwards, after this brother was there?

A. I went home to my brother and my mother and my sister.

Q. In Creston, Iowa? 49

A. In Creston, Iowa, yes, sir.

Q. And at the time that you returned home from Chicago, returned to your home in Creston, who were then the members of the family after you returned?

A. My mother, brother, sister and myself.

Q. Just the four of you?

A. Yes, sir.

Q. What had become of the other brother that you speak of?

A. He was married before that, he left home. 50

Q. At that time he was a married man?

A. Yes, sir, and away from home.

Q. And maintaining a home of his own with his family, was he?

A. Yes, sir.

Q. After you returned to Creston, Iowa, did you continue thereafter to be a member of the family?

A. Yes, sir.

Q. And what, if, any, support or contribution did your brother make to you after you returned 51 home?

A. He told me that he—

Q. No, what did he give you, what contribution did he make?

A. He gave me from $15 to $20 every week.

Q. How often?

A. Every week.

Q. And for how long did he continue those contributions?

52 A. Up to the time of his death.

Q. Do you know approximately what he was earning during that period of time, per month?

Mr. Stearns: We have got the earnings all here.

Mr. Miner: That is all agreed upon?

Mr. Stearns: Yes, we will stipulate those.

Mr. Miner:

Q. Do you know what the custom of your brother was with reference to his earnings from month to month as he received them from the de-

53 fendant?

Mr. Stearns: Objected to as incompetent, calling for a conclusion of the witness.

The Court: Objection is overruled.

Mr. Stearns: Exception.

A. Yes, sir.

Q. What, if anything, did he do with his earnings, from month to month, above that portion which he gave to you?

A. He gave to my mother, with the exception of what he kept out for his own personal needs.

54 Q. And state whether or not that was his custom and practice—

The Court: How much did he give to the mother?

A. It varied according,—you know he was paid according to the mileage. Sometimes his check was larger than sometimes, all depended on mileage. He was the support of the family.

Mr. Stearns: I ask that the answer be stricken out.

The Court: Stricken out as not responsive. 55

(Question is read by the reporter).

Mr. Miner:

Q. During the 3 years and 8 months that you have spoken of, was that customarily what he did right along during that period?

A. Yes, sir.

Q. Do you know whether or not your brother had been promoted in the service just before he met with this accident?

A. Yes, sir.

Q. Had he been promoted? 56

Mr. Stearns: Just a minute. Objected to as incompetent, calling for a conclusion of the witness, the answer must necessarily come from hearsay.

The Court: If she knows I suppose she might answer.

Mr. Stearns: May I ask a question in cross-examination?

The Court: Yes.

Mr. Stearns:

Q. Where did you get that information from? 57

A. I was at home during the time he was studying and I was at home when he left for his examination and when he came back and told me personally that he had passed his examination and was expecting the next day to take his first run.

Mr. Stearns: I object to the testimony on the ground that it is hearsay.

Mr. Miner:

Q. Did you see any document or statement of

58 any kind from the defendant relating to his advancement?

Mr Stearns: Objected to as not the best evidence.

The Court: Objection is overruled.

A. Yes, sir.

Q What was it that you saw?

Mr Stearns: Just a minute, that is objected to as not the best evidence.

The Court: The question asks for the nature of the document and the general contents of it?

59 Mr Miner: No, just the general nature.

Q What was it you saw from the company that you speak of with reference to this advancement?

A He had literature there that showed that he had passed.

Mr Stearns: I move that the answer be stricken out as incompetent and hearsay.

The Court: I think the answer was not responsive, it may be stricken out.

Mr Miner:

Q What sort of a document was it that you
60 saw from the defendant railroad company that bore upon those questions of his advancement from fireman to engineer?

A I didn't pay much attention only what he told me. He showed me some things there, I didn't pay much attention to it.

The Court: You don't know what the document was?

Mr Miner:

Q You don't know what the document was?

A No, sir, I don't. 61

Q Now, Miss Anderson, what was the state of your brother's health prior to the time that he received this injury, as to whether he was a well, strong man, or otherwise?

A He was a well, strong man.

Q What were your brother's habits in life, as to whether or not he was a sober, industrious man or otherwise?

A He was a sober, industrious man.

Q What were his habits with reference to being extravagant or economical in his personal 62
expenditures and his manner of living?

A He was economical, he was a home man.

Q Do you have any knowledge of approximately the amount of money that he expended for his own personal necessities or wants from each of his monthly earnings, not accurately, probably, but approximately, the amount which he would expend for his own personal wants from month to month?

A I can't give that exactly only he was not an extravagant man. He only needed very little, for 63
when he left on his runs for the other end, that was the only expense he was under outside of his clothing and that was not beyond reason.

Q State whether he had any expensive habits of any kind?

A No, sir.

Q Whether he smoked and drank or anything of that kind?

A No, sir.

64 Q. Whether or not he was extravagant or economical in his manner of dress?

A. No, sir.

Q. Was he extravagant or was he economical, which?

A. Economical.

Q. Whether or not, with the exception of the sums which he expended necessarily for his own requirements, the remainder of his earnings were contributed to you and the mother?

A. Yes, sir.

65 (At this time recess was taken until 2 o'clock, at which time the trial was resumed.)

Q. Shortly after you returned to your home on the first occasion, after your meeting with your brother in Chicago, state whether or not the health of this sister that you have spoken of became impaired.

A. Yes, sir, it did.

Q. Just tell the jury about that, what occurred with reference to her health?

The Court. When was that?

66 Mr. Miner. Just shortly after she came back to the home from Chicago, after the talk with her brother.

Mr. Stearns. I don't see how that is material, if the Court please, we are raising no issue about—

The Court. Why is that material?

Mr. Miner. I don't know as it is material. I thought I would offer the proof and if counsel objects to it I will withdraw the question.

The Court: There is no doubt that she since died? 67

Mr. Miner: Yes, she died very shortly after.

The Court: I suppose there is no objection to it.

Mr. Stearns: I don't care to go into details how she died, as long as she died.

Mr. Miner: I will withdraw the question.

Q. Did this sister who was present with the brother in Chicago on the occasion that you have spoken of, have a fatal illness and pass on shortly after you returned home? 68

A. She did.

Q. How long after?

A. She passed on about five or six months after I returned home.

Q. What was the state of your mother's health at the time that you returned to the home from Chicago?

A. Very poorly.

Q. And whether or not she continued in the poor state afterwards or did she recover?

A. No, sir, she had chronic trouble. 69

Q. Of the heart?

A. Yes, sir, she had heart trouble.

Q. And she survived the death of your brother how long?

A. About six months.

CROSS EXAMINATION

By Mr. Stearns:

Q. Miss Anderson, you are 32 now?

70 A. Yes, sir.

Q. What year did you say you first went to Chicago?

A. In either 1910 or 1911.

Q. So you were about 19 years of age when you first went to Chicago?

A. Well, I didn't figure the age. My brother was killed in 1920; I came home in 1917.

Q. Well, about 1910 or 1911 you went to Chicago?

A. I judge so.

71 Q. What part of the year in 1917 did you return home?

A. In February or March.

Q. And had you been living in Chicago continuously from 1910 up to 1917, February or March?

A. With the exception of the times that I went home. They sent for me several times in between that time.

Q. And you had been working in Chicago all

72 that time?

A. Yes, sir.

Q. Your mother's health, you say, had been poor?

A. Yes, sir.

Q. And you went home to take care of her?

A. Yes, sir.

Q. Your brother had paid you how much, $15 and $20 every week?

A. Yes, sir.

Q. Was that paid to you weekly or monthly or 73
semi-monthly?

A Well, he was paid semi-monthly, therefore I got it semi-monthly, but it was agreed so much every week.

Q Was it always the same amount?

A Sometimes it was more, depending on his salary.

Q Did he own the home in which you were living?

A That was in my mother's name.

Q Did he pay for the upkeep of the home? 74

A. Yes, sir.

Q And the repairs of the place?

A. Yes, sir.

Q Bought your mother's clothes?

A. Yes, sir.

Q Also bought your clothes?

A. He gave me the money and I bought my own clothing.

Q Did he furnish the household necessities?

A. Yes, sir.

Q And everything in the place and the light? 75

A With the exception of the times that with my money that he gave me that if I wanted to buy any gift for my mother that I thought would please her I bought it.

Q And in return you took care of your mother?

A Yes, sir.

Q And you took care of the house?

A Yes, sir.

Q And you did the cooking?

76 A. Yes, sir.

Q. And you ran the house?

A. Yes, sir.

Q. You also started in taking care of your brother?

A. Yes, sir.

Q. You cooked for him while he was at home?

A. Yes, sir.

Q. Was the sum of $15 or $20 a week he paid you for the services you rendered?

A. Yes, sir.

77 Q. That is right, isn't it?

A. Yes, sir.

Q. In Chicago, did you work at one place all the time that you were in Chicago?

A. No, sir.

Q. What different places did you work at?

Mr. Miner: That is objected to as immaterial.

The Court: It was gone into on direct examination that she worked in Chicago.

Mr. Stearns: It is proper under the statute and just to save time I will put it in now.

Mr. Miner: All right.

78 Mr. Stearns:

Q. What different places did you work at?

A. I worked for Sheer Brothers as cashier.

Q. How long?

A. Well, I worked for him off and on.

Q. Approximately how long?

A. For 5 or 6 years.

Q. And when did you leave him?

A. In the fall of 1916.

Q. And what were you being paid for your 79
time?

Mr. Miner: That is objected to as immaterial.

Mr. Stearns: I would like to have this testimony go in subject to being stricken out if the Court finds it is not material. My object in offering this testimony is to show that her arrangement in going back was not because she was in condition of being dependent but of her own free will and under her arrangement and I think it is material.

The Court: Your purpose, you say, is to show that she went back of her own free will? 80

Mr. Stearns: I want to show that she went back of her own free will and she was not in condition to be dependent or entitled to be dependent.

(Discussion by court and counsel.)

Mr. Stearns: Defendant offers to prove that Miss Anderson from 1910 until 1917 was employed in the City of Chicago, Illinois, and that during the first part of her employment she made $24 per week, and at the time of going back to Creston, Iowa, in 1917, she was making a salary of $33 per week and had been making that salary for some 81
time prior thereto, or from 1910 to 1917 she was employed continuously at Chicago at a salary not less than $24 per week and not over $33 a week.

Mr. Miner: That is objected to as wholly immaterial and as offering no basis for recovery here, which is just simply upon the question of contributions and reasonable expectancy as to their continuation.

The Court: Objection sustained.

82 Mr. Stearns: Exception. You are not raising the point that it is not proper cross-examination?

Mr. Miner: And not proper cross-examination.

Mr. Stearns: Then I will wait and put her on the stand later and make the same offer.

Mr. Miner: I will make the same objection then outside of that.

Mr. Stearns:

Q. Your mother was 62 years of age?

A. Yes, sir.

Q. At the time of her death?

83 A. Yes, sir.

Q. Or at the time of your brother's death?

A. She only lived six months afterwards, so it was in the same year.

Q. Had you worked in Creston other than in the home of your mother and brother between 1917 and the time of his death?

A. Only during the time that the flu broke out, that they were in need of nurses and the doctor that took care of my sister asked me to help him out.

84 Q. You did not work regularly?

A. No, that was no regular salary, just charity for what I did.

Q. Did you handle the finances of the home, that is, make the expenditures?

A. Yes, sir.

Q. I presume your mother had nothing to do with buying the groceries?

A. I did the buying of the groceries with the exception of the time that she did the buying, we

worked together. 85

Q. You made the payments for the groceries, did you?

A. Out of my mother's money.

Q. Your brother paid for everything in the line of his amusements, his clothing and the like?

A. He took care of that himself.

Q. And also when he was away?

A. I took care of that.

Q. At any time were the payments more than $15 or $20 per week?

A. It all depended on his salary and what I 86
needed. If I wanted to get anything he would give me that much more.

Q. So his giving you amounts of money depended on what you needed for the house?

A. No, what he gave me was to help me along. I couldn't stay there for nothing, you know, and I had to have a little spending money for myself and my clothes, and a man don't understand that. So he agreed to give me enough for my clothing and spending money, etc. We worked together in a family budget and everything went together. If 87
I wanted to buy anything for my mother in the line of furniture, if I had any extra money I would put it in. We worked together as a family.

Q. And in return for this money you rendered your services and took care of the household?

A. I acted as the manager of the household.

Q. You rendered your personal services?

A. Yes, sir. I rendered my services but I wasn't hired by the day or week.

88 Q I understand, there was no set sum of money; he gave you for your services whatever he felt he could afford to give and whatever you needed?

A Yes, sir.

RE DIRECT EXAMINATION

By Mr Minor:

Q Do you mean, Miss Anderson,—let us get this so the jury will understand it,—do you mean that the understanding between your brother and
89 yourself was that you were to work there in the home as a servant for a salary?

A Positively no, I was not a servant.

Q Or do you mean that he was contributing to you as a sister for your services?

A Yes, sir.

Q To enable you and help to support yourself?

A Yes, sir.

RE CROSS EXAMINATION

By Mr Stearns:

Q You went back to Iowa to take care of your
90 mother?

A My mother and sister, they were both sick, yes, sir.

Q And your brother was paying for your services rendered to your mother and sister and to him?

A Well, if you term it services, I couldn't say that. He agreed to pay me so I wouldn't be in want and I could depend on him for my upkeep.

Q Provided—

A. But he didn't pay me as a servant. I wasn't 91
hired as a servant because I was a member of the family.

Q. I understand that, but he agreed to pay you provided you would come back and take care of them?

A. He agreed to provide for me if I came back and stayed at home, as I did.

Q. In other words, if you had continued working in Chicago and had not gone home to your mother, he would not have paid you $15 or $20 a week, would he? 92

A. No, sir.

MARY LECLAIR,

being duly sworn in behalf of plaintiff, testified as follows, examined by Mr. Miner:

Q. What is your name?

A. Mary LeClair.

Q. You live where?

A. At the present time, Chicago, Illinois.

Q. You know Miss Anderson, who just left the stand, do you? 93

A. I do.

Q. How long have you known her?

A. Since 1910.

Q. Did you hear her testimony as to a visit paid to her in Chicago by her brother and sister?

A. I did.

Q. That occurred at your home?

A. Yes, sir.

Q. You recollect that occasion?

94 A. I do.

Q. Who were present at the time that this meeting took place?

A. Elmer Anderson, Ada Anderson and Inez Anderson.

Q. And yourself?

A. Myself.

Q. What year was it, do you recollect?

A. In 1916, in the fall.

Q. What did Mr. Anderson say to his sister with reference to her coming home on that occa-
95 sion, if anything?

Mr. Stearns: That is objected to as incompetent, immaterial and irrelevant and hearsay.

The Court: This is a conversation with a deceased person, but by a person who is not a party to this action.

Mr. Miner: Certainly not within the rule prohibiting conversation of that kind.

The Court: The only question is whether it is hearsay evidence, an exception to the rule of hearsay evidence.

Mr. Stearns: It could only come under an exception of the rule of hearsay as part of the res gesta but this is long prior to his death.

Mr. Miner: We think it is competent and we ask the Court to take the proof.

The Court: Objection is overruled.

Mr. Stearns: Exception.

A. He told her to come home and take care of the house and he would pay her a great deal more money than she could earn in Chicago, and in the

event of the mother passing out, if she would still 97
keep his home she could depend on him for the future.

Mr. Stearns: We object to the latter part of that.

The Court: Objection is overruled.

Mr. Stearns: Exception.

CROSS EXAMINATION

By Mr. Stearns:

Q You say that he told her that if she would come home and take care of the house and his 98
mother that he would pay her more than she could earn in Chicago?

A. Yes, sir.

Q You have heard her testify as to what he paid her, haven't you?

A. Yes, sir.

Q And you know, don't you, that she was earning far more money in Chicago than that?

A. No, I don't.

Q You don't know for whom she worked?

A I know for whom she worked and she was 99
not earning that much money.

Q Isn't it a fact that she was earning $33 a week in Chicago?

A Absolutely not.

Q It is not a fact?

A No, it is not a fact.

Q What was she earning?

A. I couldn't say for sure but I don't think it was more than $12.

100 Q If you can't say for sure how do you know?

A I know—I can't exactly state the amount, whether it was $12 or $15, but it wasn't any more than that, that I know.

Q You know that. You know where she worked just before she went home to Creston?

A For Mr. Sheer.

Q She was paid at Mr. Sheer's, wasn't she, $28 a week, with a $5 commission, making $33 a week?

A No, I don't know anything about that.

Q Do you know whether that is a fact or not?

101 A She never told me that. She told me she was only earning—I can't say for sure whether it was $12 or $15.

Q Didn't she get $12 a week when she started to work for Sheer; she worked there six or seven years and that is what she got when she started?

A I think that is what she got.

Q You wouldn't expect her to work for six or seven years with the same salary?

Mr. Miner. That is objected to as calling for the opinion and conclusion of the witness.

102 The Court. Objection is overruled.

A At that time $12 was a big salary and I wouldn't say that he paid her more. He possibly did but I don't remember at the present time.

Mr. Stearns.

Q Well, as a matter of fact, you never knew how much he paid her, of your own knowledge?

A I wouldn't just swear to it, still I am pretty sure that he didn't pay her more than $12 or $15, because at that time that was a pretty good salary.

in those times. 103

Q. In 1917?

A. That was 1911 and 1912.

Q. How about 1917? What was she earning in 1917?

A. I couldn't say that.

Q. What was she earning in 1916?

A. I couldn't say that either but I know when she worked for Mr. Sheer it was only $12 or $15.

Q. She worked for Mr. Sheer, she testified, from 1910 until 1917.

A. At different times. 104

Q. Only when she went back to make those visits, that was her testimony.

A. No, she didn't work steady.

Q. Do you know what she was earning in 1913?

A. I wouldn't say in regard to her salary. I know she wasn't getting any more than $12 or $15. I am pretty sure of that.

Q. And the brother said that if she would come back and take care of the mother and the house he would pay her?

A. He sure did. He said he would pay her 105 more than she could earn in Chicago.

REDIRECT EXAMINATION

By Mr. Miner:

Q. And that if the mother passed away he would still pay her, something to that effect?

Mr. Stearns: Wait a minute—

Mr. Miner: Q. You said that, didn't you?

A. Yes, after the mother passed away she could still depend on him for her living and that he

106 would look after her future, that is what he told her.

Mr. Stearns: Q. If she would continue to render services for him at the home?

A. That is what was understood, I suppose.

Mr. Miner: Will you admit that under the mortality tables Mr. Anderson had an expectancy at the time of his death of 33.92 years, and that Miss Anderson, at the age of 30, had an expectancy of 35.33 years?

Mr. Stearns: Subject to the competency of such
107 testimony.

Mr. Miner: Now, as to the earnings, you had some table with reference to that?

Mr. Stearns: I have got November and December, 1918, and the full years of 1919 up to the time of the death, showing the total earnings, average earnings per year, average earnings per month, showing the back pay, when it was paid, and all that, and it was taken from the original record.

(Plaintiff's Exhibit A is marked.)

Mr. Miner: Plaintiff offers Plaintiff's Exhibit
108 A in evidence. May it be admitted that the Wells-Dickey Trust Company is the duly appointed administrator?

Mr. Stearns: Yes, sir.

Mr. Miner: The plaintiff is duly appointed by the probate court of Hennepin county special administrator of this estate, for the purpose of this law suit?

Mr. Stearns: Yes.

Mr. Miner: I think that is all. Plaintiff rests.

ADA C. ANDERSON, 109

being recalled for cross-examination under the statute, testified as follows, examined by Mr. Stearns:

Q. Miss Anderson, your brother was living at Creston, Iowa, at the time of his death?

A. Yes, sir.

Q. What county of Iowa is that in?

A. Union county.

Q. Shortly after his death and prior to the commencement of this action you petitioned the probate court of Union county, Iowa, to become 110
administratrix of your brother's estate, did you not?

Mr. Miner:

Objected to as immaterial.

The Court: Why is it material?

Mr. Stearns: It is material, your Honor, because the statute provides that when a general administratrix has been appointed a special administrator cannot act any further, and I am going to raise that point.

The Court: Has that been threshed out? 111

Mr. Stearns: Not in that case.

Mr. McDonald: It was mentioned by the Supreme Court.

Mr. Stearns: This is all denied in this case and the point was not raised before, not passed upon by the court.

Mr. Miner: I raise the further objection they cannot collaterally inquire into the appointment of an administrator.

112 Mr. Stearns—Defendant now offers to prove that Ada C. Anderson, on the 17th day of January, 1921, in the probate court of Union county, Iowa, a court of competent jurisdiction, petitioned said court for letters of administration of the estate of her brother, Elmer E. Anderson, that on the 14th day of March, 1922, the probate court of Union county, Iowa, appointed said Ada C. Anderson, administratrix of the estate of her brother, Elmer E. Anderson, and thereupon Ada C. Anderson filed a bond, approved by the court and then and there
113 became the duly appointed, qualified and acting administrator of the estate of her brother, Elmer E. Anderson, that she was at all times a duly appointed, qualified and acting administratrix of the estate of Elmer E. Anderson from March, 1922, up to the time of the commencement of this suit, and is still the duly appointed, qualified and acting general administratrix.

Mr. Miner—Objected to as immaterial.

The Court—Objection is sustained.

Mr. Stearns—Exception.

114 Q. Now, Miss Anderson, after your mother died you went back to Chicago?

A. Yes, sir, about six or eight months after she died.

Q. And you have been working in Chicago since?

A. Yes.

Mr. Miner—That is objected to as immaterial.

The Court—Since the death of the mother?

Mr. Miner: Yes, since the death of the mother 115
and the brother also.

A. I had to have some—

Mr. Miner: Wait a minute.

The Court: Objection is overruled.

Mr. Miner: Exception.

A. Yes, sir.

Mr. Stearns: Q. And isn't it a fact that at the time you went back to your home in Creston in 1917 and for some time prior thereto, you were being paid $33 a week salary?

Mr. Miner: That is objected to as immaterial. 116

(No ruling.)

A. No, sir.

Mr. Stearns: Q. You were being paid $28 a week?

A. No, sir.

Q. You were not?

A. No, sir.

Q. Were you working for Sheer Brothers?

A. Yes, sir.

Q. What were you being paid?

Mr. Miner: That is objected to as immaterial. 117

The Court: Objection is overruled.

Mr. Miner: Exception.

A. I started with a salary of $12, $10 or $12, I don't remember, and sometimes he paid me extra for a little extra bookkeeping I did, but I never received a salary of $33, never.

Mr. Stearns: Q. What was the highest salary you did receive from Sheer Brothers?

A. I don't think I ever got over—if I got $22

it was the most I ever got from Mr. Sheer.

Q Miss Anderson, didn't you have a conversation with me in Mr. McDonald's office last week?

A You talked to me, yes, sir.

Q And didn't I say to you at that time that I wanted to go over this report as to your earnings and find out whether they were correct and whether it would be necessary for me to bring in witnesses to prove the earnings, and you read them over; and isn't it a fact that at the time you went back to Croston you were drawing a salary from Sheer Brothers of $28 a week and an additional $5 a week for taking care of the books?

A I don't remember that you asked me.

Q Will you say that I didn't ask you?

A I wouldn't say you asked me.

Mr. Stearns Mr. McDonald, you were right there, isn't that a fact?

Mr. McDonald We had some conversation and you read this off. I said to you, as far as this earning capacity was concerned I didn't think there would be any question about it because it would not be material, but you read it off just as it is there.

Mr. Stearns And you agreed with me, just as it is there that if it was material you would stipulate to save me the trouble of bringing witnesses?

Mr. McDonald Yes, sir. I don't know whether she understood it or not. You read this over in the presence of all of us, there is no doubt about that, and at that time I said: "I don't think it is material." You said, "It may not be, I don't know.

myself."

Mr. Miner: Not in my presence.

Mr. Stearns: I don't believe you were in this case, Mr. Tautges was attorney in this case.

Mr. McDonald: You read this off, that about her salary, there is no question about that. I know you mentioned the figures and I know you mentioned the extra $5 for taking care of the books, but I know there was some dispute as to that.

Mr. Stearns: Yes, sir—

Mr. McDonald: Your report states 1920 and it was three or four years after that, we straightened that out.

Mr. Stearns: We straightened that out.

The Witness: And you said there must be some mistake in this record.

Mr. Stearns: No, I told you—the point you raised was that you had gone back to Creston March, 1917, that is the point you raised. Let me ask you again, your salary at the time was $12 a week when you started to work?

A. I started at $12.

Q. Did you get any extra pay?

A. Later on, right before I quit him, he paid me $5 a week extra for some bookkeeping for some extra business he had.

Q. You still say you never got any higher actual salary than $22 a week?

A. Yes, sir.

Q. And that you never received that $28?

A. I never received $28.

124 Q But you did get an additional $5 for taking care of books?

A Occasionally $5 a week, but that was not regular.

Q In our conversation I read you this and I read you the $28?

A I didn't pay no attention to what you read me, only when it came—

Q Just look over the second paragraph and see if that is what I read off to you?

Mr McDonald She said she don't recollect
125 the amount she was paid.

A You read this over, I don't remember just what you read.

Mr Stearns I ask for a continuance of the case to enable me to get proof as to the earnings. The facts were stipulated before the trial and on that account I did not get the witnesses. It would be a simple thing to get a deposition in Chicago.

The Court It is admitted that it was stipulated?

Mr McDonald He came over by appointment
126 and I told him if there was anything about the salary of Miss Anderson that we would be glad to agree to it if it was correct, because that point, we claim, is not material in the case. He came over and read part of this and it was all satisfactory—as far as I know it was—as it was read, except this date.

The Court Well—

Mr McDonald I told her at that time it wouldn't make any difference whether she was

earning a million dollars a year or five dollars a 127
year, that wouldn't be the point.

The Court: What I want to know is whether you stipulated with counsel the facts stated in that letter or memorandum.

Mr. Stearns: It was stipulated by the three of us.

Mr. McDonald: I stipulated, Miss Anderson did not. I said if there was anything that you wanted to show in this trial that would be material it would not be required of you to go to Chicago to take a deposition. 128

The Court: That was equivalent to admitting that—

Mr. Miner: As far as the stipulation was concerned, it was not made in my presence. If it was stipulated that the figures that are presented should go in as evidence they should go in, but I ask that they be admitted subject to the objection which I have made as to their being wholly immaterial.

The Court: I understand the situation is that there was a stipulation that those figures as to the 129
earnings are correct, and you are willing—

Mr. McDonald: Whether or not the witness understood, of course I do not know.

The Court: You are willing they should go in subject to your objection as to materiality?

Mr. Miner: If that stipulation was made it should be lived up to.

The Court: Was it made?

Mr. McDonald: That is just the conversation.

130 The Court: I think it amounts practically to a stipulation.

Mr. McDonald: With this reservation, it was read off as it is there by Mr. Stearns. I said: "Go right ahead, you need not take a deposition," whether she understood it or not, I don't know.

The Court: Well, you were her counsel. I think it appears satisfactorily there was a stipulation that those earnings were the earnings she was paid in Chicago and it would not be necessary to take any deposition to prove it.

131 Mr. McDonald: I don't know what she understood about it.

The Court: That is not very material, what she understood about it; what you gave counsel to understand.

Mr. Stearns: Then may it be stipulated that the earnings of Miss Anderson with Sheer Brothers, when she went to work for them in 1910 or 1911, when she started, were $12 a week, and at the time of her leaving in March, 1917, were $28 a week, with an additional $5 a week for taking care of
132 books?

Mr. Miner: Well, I don't know about that, if those figures are produced for what they are worth, now you are asking in addition to that that we are to stipulate that this girl's wages were so much, that I dissent from.

The Court: You dissent on the grounds that it is wholly immaterial.

Mr. Miner: Yes, on the grounds that it is wholly immaterial.

The Court: Why not have it understood that 133
those are the facts as to her earnings, subject to the claim of the plaintiff that they are immaterial?

Mr. Miner: If your Honor please, I do not want to disavow any stipulation that Mr. McDonald made, but I say that this lady ought to know what the figures are and nobody had a right to stipulate what was not true.

(Discussion between court and counsel).

Mr. Miner: I am perfectly willing to stipulate that if you called this gentleman from Chicago he would testify that those were the wages that were 134
paid.

The Court: Isn't that a fair proposition? Counsel stipulates that if your witness were called he would testify that those were the wages that were paid.

Mr. Miner: But I object to the evidence as wholly immaterial.

The Court: Yes, the stipulation is in the record as now made up.

Mr. Miner: I object to the evidence or figures as wholly immaterial, as not having any tendency 135
to prove the expectancy of this girl to receive contributions in the event he was killed.

Mr. Stearns: It is my understanding that it is stipulated that if Mr. Sheer, the employer of Miss Anderson, were called as a witness he would testify that Miss Anderson's wages from 1910 while working for Sheer in Chicago, were $12 a week, that at the time she left in 1917 and for some time prior thereto her wages were $28 per week and $5

136 per week additional for caring for the books.

Mr. McDonald. That is objected to as being wholly immaterial to the issues in this case.

The Court. Objection is overruled.

Mr. McDonald. Exception.

Mr. Stearns. Defendant rests and moves the Court to direct a verdict for the defendant on the ground that plaintiff under the complaint and the admitted facts has failed to establish a cause of action. It appears conclusively from the record that deceased left a mother, a member of the second
137 class of beneficiaries under the Federal act; that the parties were engaged in interstate commerce and are governed by the Federal act; that he left no wife or children; that the mother survived him and the cause of action vested in her, and that when she died in May, 1921, the cause of action died with her. On the further ground that plaintiff has failed to show any dependency within the purview of the Federal act, being a member of the third class of beneficiaries.

The Court. Motion is denied.

138 Mr. Stearns. Exception.

Counsel thereupon addressed the jury, after which the Court charged the jury as follows:

COURT'S CHARGE.

Ladies and Gentlemen of the Jury:

It is the duty of the court to charge the jury upon all questions of law to preside at the trial and rule upon objections, and it is the duty of the jury to accept the law just as given to you by the court. If counsel have inadvertently or other-

wise, in their discussions of the law in this case— 139
and it has been very freely discussed—made any
statement as to the law which disagrees with the
statement which the court will give you, or if any
member of the jury has any conception of what the
law is or should be different than the court gives
it you are to disregard such statement made by
counsel, if made, or such conception as you may
have as to the law, insofar as it disagrees with the
law as given you by the court, and accept the law
given by the court without any qualification.

On the other hand, the jury are the sole and ex 140
clusive judges of the questions of fact involved in
this case, and you are to rely solely upon your own
recollection as to what the facts are. If counsel
or court make any statements as to what the facts
are in this case which are not in accord with your
recollection, you are to disregard the statements
made by counsel also by the court, insofar as they
disagree with your recollection, and to rely entirely upon your own recollection.

You are the sole judges, also, of the credibility
of the witnesses. It is for you to determine (there 141
have been only two witnesses in this case) to what
extent you will believe these witnesses and what
they have said. In determining the credibility of
these witnesses you will take into consideration
how their testimony had been given, whether it has
been given in a frank, open and candid manner or
the reverse. You may take into consideration also
the interest which these witnesses may have in the
outcome of the trial of the case and how far, if at

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144

note in that class, to the parents of the employee, 145
and if there are no surviving parents then to the
next of kin dependent upon the employee.

In this case there is no dispute but that the de-
ceased was killed while working for the defendant
company on November 1, 1926, at Stanton, Iowa,
and there is no question as to the negligence of
the defendant, and no question has been raised of
contributory negligence; leaving the only question
for the jury to determine, what amount, if any,
the plaintiff is entitled to recover on behalf of the
sister of the deceased, Ada C. Anderson. In other 146
words, was the sister entitled to recover damages
as the next of kin of the deceased dependent upon
the deceased.

It appears from the evidence offered that the de-
ceased was employed as a fireman for the defendant
company at the time of his death, and for many
years prior to that time, to-wit, since 1900, Myers
lived at West Chicago in 1916, where his sister,
Ada Anderson, and presumably [illegible] were
then residing, and refused [illegible] to return home to
Creston, Iowa, where the family lived with a 147
their sister, the record being silent [illegible]
mother's health was poor and it was necessary
there should be some one to look after her.
That thereafter Ada Anderson [illegible] with
home [illegible] the latter part of the year 1916 or
part of 1917 and being [illegible] the money
[illegible] the mother [illegible] May, 1921. That
[illegible] the record [illegible] that [illegible]
[illegible] [illegible] [illegible]

able expectation of pecuniary benefit by the wrong- 151
ful death of the brother, the damages being limited
strictly to the financial loss sustained. The true
test is, as to the amount of recovery, if any re-
covery is had, what, in view of all the facts and cir-
cumstances in evidence, was the probable pecu-
niary interest of the sister in the continuance of
the life of the deceased.

A fair estimate may be arrived at by taking
into account the question of the occupation of the
deceased, in this case a fireman, and the average
annual income from 152
there is no dispute as to what he was receiving.
And his health, age, probable duration of life, his
habits, talents of industry, his success in life in
the past, and the amount of aid in money or serv-
ices which he had been accustomed to furnish
to beneficiary, in this case, his sister. The prob-
able duration of life is a proper element to be con-
sidered, but the life expectancy according to mor-
tality tables is not conclusive. The jury may make
its own estimate from the facts, health, habits and
physical condition of the deceased at the time of 153
his death.

It is impossible, I think, for the court to make
it any more definite than that. I know it is not
at all satisfactory to you gentlemen, but we get as help
But we submit to you that you are to take into con-
sideration all these matters that I have referred to
in giving of the damages. That is all that the
law will allow you to consider, and the amount
that you will allow the plaintiff is entirely
within the discretion of the jury.

154 cover.

The burden of proof is upon the plaintiff to be satisfied by a fair preponderance of the evidence, first, that the sister, Ada Anderson, has been deprived by the decease of her brother, and second, if she has been damaged, in what amount, under the rules of law I have given you. By fair preponderance of evidence I mean simply the greater weight of the evidence and testimony. It is with the side which presents the greatest degree of conviction to the mind of the juror where there is a dispute.

155 I want to call the jury's attention to what is called the two-thirds jury law, and that is, if the jury are unable to agree unanimously after being out for twelve consecutive hours, but a verdict may be arrived at by not less than nine members of the jury, in which case the verdict will be signed by all those who concur and dated upon that day. However, the verdict is unanimous or it need only be signed by nine persons. Which you will select yourselves upon retiring.

Two forms of verdict have been prepared by the 156 clerk, which you will take with you. One is in the following language:

"We, the jury in the above entitled action, find for the plaintiff and assess the damages in the sum of ..... dollars."

If you find that the plaintiff is entitled to recover, then you will use this form. But if you find that the plaintiff is not entitled to recover, then you will use the following form:

"We, the jury in the above entitled action, find

for the defendant."

If you find that the plaintiff is not entitled to recover then you will use this form and have it dated and signed by your foreman."

(Stay of forty days is agreed upon)

157

COPY OF PLAINTIFF'S EXHIBIT A

Statement showing earnings of Joe Ireman, E. E. Anderson

Year 1918-1919

November, 1918	$123.47
December, 1918	85.63
January, 1919	119.62
February, 1919	111.28
March, 1919	118.42
April, 1919	119.50
May, 1919	120.48
June, 1919	124.80
July, 1919	128.86
Back Pay	55.80
August, 1919	130.90
September, 1919	131.39
October, 1919	165.36
Total	$1549.21

158

159

Year 1919-1920

November, 1919	$ 76.32
December, 1919	150.56
January, 1920	96.91
February, 1920	134.52
March, 1920	140.08

180	April, 1920	127 66
	May, 1920	133 39
	June, 1920	77 25
	July, 1920	154 73
	August, 1920	175 21
	September, 1920	292 65
	October, 1920	227 75
	Back Pay	1 44 engineer
	Back Pay	19 06 fireman
	Back Pay	4 58
181	Total	$1,906 52
	Total earnings for two years	$43,437
	Average earnings per year	17,374 80
	Average earnings per month	1,447 90

Back pay allowed as follows:

$6 50 Supplement #1 General Order #27 January to April, 1920, inclusive.

$4 58 Interpretation #1 to Supplement #15 and General Order #27, January to August, 1920, inclusive.

$1 44 engineer and

182 $19 06 fireman under Decision #... Docket 1, and in covering May, June and July, 1920.

(Title of Cause) 163

NOTICE

To the Plaintiff above named, and Fantus & Wild or Robert J. McDonald, and F. M. Miner, its attorneys:

Please Take Notice, That the within transcript of testimony in the above case, consisting of forty-one (41) typewritten sheets, is hereby served upon you as a case in the within entitled action, containing all the evidence offered or received, and proceedings had at the trial, including the Court's 164
charge to the jury.

If dissatisfied, you are invited to prepare and submit such amendments as you deem advisable.

Dated January 3, 1925.

PIERCE, MCDERMOTT, STEARNS & WELLS,
Attorneys for Defendant,
201 Commerce Building,
St. Paul, Minnesota.

165

166 [Title of Cause]

STIPULATION SETTLING CASE

It Is Hereby Stipulated by and between the parties to the above entitled action, that the foregoing within transcript of testimony, consisting of Forty-one (41) typewritten sheets, contains all the evidence offered or received in evidence by the respective parties to said action at the trial thereof, including the plaintiff's Exhibit "A," together with all objections thereto, the rulings of the court

167 thereon and all objections taken to said rulings, also the charge of the court to the jury, together with all objections thereto by the respective parties, and also all court proceedings had at the trial of said action, and that the same may be settled and allowed by the court, as and for the settled case herein.

Dated February 14, 1925.

Jacobus & Wilcox,

Rugg & McDermott & F. M. Myers,

Attorneys for Plaintiff.

168 Dunning, McDermott, Stevens & Weeks,

Attorneys for Defendant.

(Title of Cause).

169

ORDER SETTLING CASE.

I, P. W. Guilford, do hereby certify that the foregoing proposed case, consisting of forty one (41) typewritten sheets, contains all the evidence and all objections made at the trial, the decisions and rulings of the court thereon, and all objections taken thereto, also the charge of the court to the jury, together with all objections taken thereto by the respective parties; also all proceedings had at the trial of the case.

170

I find that said case is conformable, and I hereby allow and settle the case as and for the settled case herein.

Dated February 14, 1925.

P. M. GUILFORD,

Judge.

171

172 (Title of Cause)

NOTICE OF MOTION FOR JUDGMENT

To the Plaintiff above named and Lancaster B... ..., Robert J. McDonald, and F. M. Moore, ... attorneys.

You Will Please Take Notice, That the above-named defendant, Chicago, Burlington & Quincy Railroad Company, will apply and move the Honorable Page W. Guilford, Judge of the above-entitled Court, at special term of said court in the
173 City of Minneapolis, County of Hennepin, State of Minnesota, on the 23rd day of January, 1926, at ten o'clock A. M., on said day or as soon thereafter as counsel can be heard

1. For an order allowing and settling as a settled case herein the transcript of testimony at the trial proposed herein, as and for a case on the 7th day of January, 1926.

2. For an order vacating and setting aside the verdict heretofore rendered herein in the sum of Four Thousand Seven Hundred ($4,700.00) Dollars, in favor of the plaintiff, and its order directing the entry of judgment notwithstanding said
174 verdict in favor of the above named defendant and against the above named plaintiff.

The motion first herein named will be based upon all the pleadings, all the files, records and proceedings herein, including the case before proposed and upon the statutes in such case made and provided.

The motion last herein named, will be made and 175
based upon the pleadings, all the files, records and proceedings herein, upon the case as settled and allowed by the Court, together with this notice, and upon the statutes in such case made and provided, and upon the following further grounds:

First: Because said verdict is not supported or justified by the evidence.

Second: Because said verdict is contrary to law.

Third: Because said verdict is contrary to the evidence. 176

Fourth: Because the court should have granted the motion of the defendant made at the close of all the evidence at said trial to direct a verdict in favor of the above named defendant and against the above named plaintiff.

Dated January 29, 1925.

Dean, McDermott, Stearns & Wells,
Attorneys for Defendant,
901 Commerce Building,
St. Paul, Minnesota. 177

178 (Title of Cause)

ORDER

The above entitled matter came on for hearing before the undersigned, one of the judges of the above named court, at the court house in the City of Minneapolis, Minnesota, on February 14, 1952, upon a motion by the defendant for an order vacating and setting aside the verdict rendered herein in favor of the plaintiff and directing the entry of judgment notwithstanding the verdict in favor
179 of the defendant and against the plaintiff. The grounds of said motion are set up in the notice of motion. Messrs. McDermott, Stearns & Weiss appeared as attorneys for the defendant and Robert J. McDonald and F. M. Miller appeared as attorneys for the plaintiff. The matter having been presented and duly considered by the court,

It Is Ordered that said motion be and the same is hereby denied.

Dated April 29, 1952.

180 By the Court

F. W. GILFILLAN

Judge.

MEMORANDUM 181

I

This is a motion by the defendant for judgment notwithstanding the verdict. The case was first tried before the Hon. W. W. Bardwell, one of the judges of the above named court, who dismissed the action on the ground that decedent's mother, who survived him, was his only beneficiary and upon her death there was no cause of action for the benefit of a remoter beneficiary. Upon appeal 182
to the Supreme Court the judgment entered in this court was reversed, and the case came on for trial again before the undersigned on November 25, 1924. The case was submitted to the jury and a verdict returned in favor of the plaintiff. Defendant now makes a motion for judgment notwithstanding the verdict upon the ground that the beneficiary for whom the action was prosecuted was not a dependent within the meaning of the Federal Employers' Liability Act of 1908.

183

II

"Judgment should not be ordered under the statute unless it clearly appears from the whole evidence that the cause of action or defense sought to be established does not, in point of substance, constitute a legal cause of action or a legal defense. It is not alone sufficient to authorize such a judgment if the evidence was such that the trial court, in its discretion, ought to have granted a

184 new trial. If there is some evidence reasonably tending to prove a good cause of action or defense, judgment should not be ordered." Dunnell's Digest, Section 3082.

III

The Federal Employers' Liability Act of 1908, so far as material, is as follows:

"Every common carrier by railroad while engaged in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and if none, then of the next of kin dependent upon such employee."

185

IV

186 The [illegible] in the first and second classes of cases [illegible] well settled. The matter is fully discussed in Roberts Federal Liability of Carriers, Volume 2, Sections 621 and 624. The rule firmly established is that there must appear, as to classes 1 and 2, some reasonable expectation of pecuniary assistance or support, of which the beneficiaries have been deprived. Michigan Central Railway vs. Vreeland, 227 U. S. 59. Dooley vs. Seaboard Air Line Railway, 161 N. C., 154.

V. 187

As to Section 3, however, it is necessary to show that the beneficiary was dependent upon the deceased, and that is the question at issue in this case. What is meant by "dependency"? Unfortunately there has not been very much construction by the courts of the meaning of the word "dependent" in the employers' liability act, and no case has been brought to the court's attention where the facts are parallel to those in the case at bar. The word "dependency" has been construed many times in connection with insurance policies. 188

The definition of "dependent" in Webster's Dictionary is as follows: "One who depends; one who is sustained by another or who relies on another for support or favor."

"The term dependents is limited to those who reasonably rely upon others for substantial nourishment or support." Bacon Benefit Societies, Volume 1, Section 261

"Dependent does not mean dependent for favor or companionship or for affection nor does it refer to occasional gifts. It means dependence for support and maintenance, need not be complete dependence for support but a regular and partial dependence." Martin vs. Woodman, 111 Ill. App. 99 189

The matter is fully discussed in the railroad cases cited in Roberts Federal Liabilities of Carriers, Sections 624 to 627. Also see note to Bertles vs. Northern Pacific R. R. Co., Ann. Cases 1912B, page 733.

190 The following are some of the cases illustrating the variety of legal definitions of the word "dependent":

"There must be, when adults claim such dependency, an actual inability to support themselves, and an actual dependence upon some one else for support, coupled with a reasonable expectation of support or with some reasonable claim to support from deceased." Duval vs. Hunt, 34 Fla., 85.

In Smith vs. Pryor, as Receiver, 105 Mo. App. 250, the brother who was killed had made occasional contributions to his sister living in Moyer, with whom he did not live. It was held she was not dependent. The court says in that case:

191 "But mere occasional gifts do not make the recipient dependent upon the giver within the meaning of the statute. True, the act does not require that the dependency must be complete or entire. A partial dependency will be sufficient to furnish the basis of an award in some amount. But dependency, either in whole or in part, must exist. It is a state or relation. Dependence is 'the state

192 of relying upon something or some one, as for anything necessary or desirable.' New Standard Dictionary. It has in it also something of the idea of continuity of relation, so to speak. The term 'dependent' in the statute is somewhat similar in meaning to the term used in the charter of associations which provides for the payment of benefits to persons dependent upon deceased members. 'A dependent, as the term is used in reference to those

benevolent associations, is one who is sustained by 193
another, or relies for support upon the aid of another." Alexander vs. Parker, 144 Ill. 355. "A person is dependent upon another when he has the moral right to rely and does rely upon such other for support either in whole or in part. Murphy vs. Novak, 223 Ill. 591. The mere fact that deceased had at different times sent her an occasional sum does not establish dependency. While it is necessary to show only pecuniary loss in the case of a husband, wife, children or parents, yet in the case of one who is not in the above category, depend- 194
ency must also be shown and be proved like any other fact."

It will be noted that the above case is not a case where the parties lived together and not a case where the sister was substantially dependent for her support upon the brother.

In Collins vs. Pennsylvania R. R. Co., 148 N. Y. Supp. 1005, it is held that only the next of kin actually dependent can recover. In this case a brother lived with his sister and it appeared that his earnings contributed to the household of $5 per 195
week but he suffered for his own support and that before there was no dependency.

In the case of Railway Company vs. Atwood, 102 Va., 440, deceased boarded with another sister, who was married and in good circumstances, and for whom the deceased made monthly contributions. Held that she was not dependent upon deceased inasmuch as the sister had a husband who supported her and the contributions

196 made by the brother did not amount to either sub-
stantial or entire support.

In the case of Booth vs. N. P. R. R. Co., 60 Wash., 632, a son made occasional contributions to the father and mother. The father supported himself as a salesman selling tea. It was held that he was not dependent, that occasional contribu-tions are not sufficient, that there must be a sub-stantial need on one side and a substantial finan-cial contribution at that need on the other side to make it dependency within the statute.

197 In the case of Hartley vs. St. Ry. Co., 198 Mass., 163, a brother made remittances to his sister who was in feeble health. Held, that there was a case of partial dependency made out which was sub-mitted.

In the case of Danielson vs. Railway Company, 80 Vt., 276, it was held that the mother could recover where the child contributed in a substantial degree to her support, although she was herself depend-ent on her husband and her own labor.

In the case of Haggerty vs. Penn. R. R. Co., 87
198 N. J. L., 388, the court defines the words "actual dependents" in the workmen's compensation act as referring to members of the deceased who were being wholly or in a substantial degree supported by the deceased at the time of his death.

Other cases of value are Railway Company vs. Roberts, 126 Ky., 801, Hepburn vs. Railway Company, 164 Mass., 559, Herbert vs. Boston & Albany Ry. Co., 156 Mass., 80, Robertson vs. Union Pac. Ry. Co., 140 N. W., 772 (Nebraska), and

Supreme Lodge, 37 L. R. A. New Series, 1191, (Nebraska); Welch vs. Railroad Company, 176 Mass., 393. 199

"Dependent" is defined in Wilber vs. New England Order, 192 Mass., 477, an insurance case, as follows: "Assistance not trivial or casual or wholly charitable, but substantial and material; a real obligation to furnish it, though not enforceable by law, resting on moral and equitable grounds and furnished, not gratuitously, but in recognition of such obligation."

200

VI.

In the case at bar it appears that the beneficiary was a sister of the deceased, 28 years of age, and that she had gone from the family home at Creston, Iowa, to Chicago, where she was employed for a number of years and entirely supporting herself. The deceased brother was a woman employed by the defendant company, receiving an average wage at the time of his decease of $143 per month, and living at the family home at Creston, Iowa, with his mother and sister. Both mother and sister were in poor health and needed care and attention. Deceased then went to Chicago and induced his sister to give up her employment and come home and take care of the household for him and the mother and sister. She did so, living there until the time of the decease of the brother, who was killed in an accident. 201

She was paid fifteen or twenty dollars a week after her return. Her brother also gave some of

202 [illegible] earnings to his mother. She went home and took care of the mother, the son paying for the upkeep of the home, buying the mother's clothing and gave the sister money for her own clothing. The sister of the deceased took care of the mother and the home, did the cooking and ran the house and what she received was for services rendered. She handled the finances of the home, paying the grocery bills, and he gave her money in addition to the fifteen or twenty dollars per week. It appears that she was not hired by the day or week
203 but did receive any regular amount that he gave her for her services whatever it could afford and whatever was needed, that she went to Iowa to care for her sister and mother, the brother asking her to see she would not be in want and could depend upon him for her support and that he agreed to provide for her if she came back and stayed at home.

There is also the evidence of another witness that the brother told her to come here and take
204 care of the home and he would pay her a great deal more than she could earn in Chicago, in the event of the mother passing on it she would still keep the home she could depend on him for the future. That some six or eight months after the death of the mother she went back but brought nothing but keep working there ever since. That the brother at all times was affectionate manner of that letter here marked

VII. 205

Considering the facts with reference to the above decision, I am of the opinion that the question is not free from doubt but that the court is not warranted under the rule of law in this state as to ordering judgment notwithstanding the verdict in making such an order and that there is sufficient evidence to warrant submission of the case to a jury. I am not inclined to follow the extreme position taken in the case of Duvall vs. Hunt, supra, where there must be an actual inability by the dependent to support herself; that such dependence as there is need not be complete or entire but there should be a substantial and more or less regular dependence of the beneficiary upon the deceased. 206

While occasional contributions under class 2 are not sufficient for definition of actual dependents given in the case of Hannah vs. Penn R. R. Co., supra, while applying to the workmen's compensation act of the State of New Jersey, seems to me to define the term "dependents" as in my judgment it 207 should be defined for the purposes of this case. In my opinion the relation of the beneficiary to the deceased in this case is somewhat analogous to that of a married woman who previous to the marriage was a wage earner entirely supporting herself and who enters the marriage relation giving to her husband services in reference to house-hold duties and other matters in return for which

208 to support her and care for her but not given her any definite or particular sum of money or wage.

In other words, I think there is sufficient evidence in this case to warrant a finding by the jury that the beneficiary, partly moved by parental love, undoubtedly was induced by the brother to give up her position of financial independence as a wage earner and to come and become a dependent in his home. That she was not a dependent in the sense that she undertook the services because of
209 necessity but a voluntary dependent, who became the manager of the household for her brother, mother and sister in return for indefinite and uncertain amounts given to her by the brother sufficient for the upkeep of the home and for her own personal needs, and that, therefore, at the time of the brother's death she was entirely dependent upon him for her support and maintenance, at least, I am of the opinion that the jury might so find upon the evidence.

F. W. GUILFOYLE,

210 Judge.

(Title of Cause). 211

JUDGMENT

The above entitled action having been regularly placed upon the calendar of the above named Court for the September A. D. 1924, General Term thereof, came on for trial before the Court and a jury duly impaneled and sworn to try the same on the 25th day of November A. D. 1924; which said jury did, on the 26th day of November A. D. 1924, duly render a verdict thereon. 212

Now, pursuant to said verdict and on motion of Messrs. Tautges & Wilder, Miner and McDonald, Attorneys for plaintiff, it is hereby adjudged that the plaintiff recover of the defendant the sum of Four Thousand Eight Hundred Forty seven and 20/100 Dollars the amount of said verdict and interest to date hereof, together with the sum of One Hundred Sixty one and 72/100 Dollars, costs and disbursements as taxed and allowed herein, amounting in the whole to the sum of Five Thousand Eight and 98/100 Dollars. 213

$5,008.98

By the Court,

WALTER A. RYBERG,
Clerk of District Court.
By W. A. CARLSON,
Deputy.

214 (Title of Cause)

NOTICE OF APPEAL

To the Plaintiff Above Named, and Messrs. Miner & Wilder and Miner & McDonald, Its Attorneys:

Please Take Notice that the defendant in the above entitled action, Chicago, Burlington & Quincy Railroad Company, appeals to the Supreme Court from the judgment and the whole thereof entered and docketed in the above entitled
215 action on the second day of June, 1925, wherein it was decreed and adjudged that plaintiff have judgment against the defendant for the sum of Four Thousand Eight Hundred Forty Seven and 26 100ths ($4,847.26) Dollars, principal and interest, with costs and disbursements, in the sum of One Hundred Sixty One and 72 100ths ($161.72) Dollars, in all amounting to Five Thousand Eight and 98 100ths ($5,008.98) Dollars.

Dated at St. Paul, Minnesota, June 6, 1925.

DENEGRE, McDERMOTT, STEARNS & WEEKS,
216 Attorneys for Defendant,
[illegible] Commerce Building,
St. Paul, Minnesota.

Bond on appeal is hereby waived.

MINER & McDONALD,
Attorneys for Plaintiff.

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1

ASSIGNMENTS OF ERROR

First: The Court erred in denying the motion of appellant to direct the jury to return a verdict for appellant.

Second: The Court erred in denying the motion of appellant for judgment notwithstanding the verdict.

Third: The Court erred in holding that the verdict was justified and supported by the evidence.

Fourth: The Court erred in holding that the verdict was not contrary to law.

Fifth: The Court erred in holding that the verdict was 2
not contrary to the evidence.

No. 493 Hennepin County Laws, C. 7

Endorsed
Filed January 29th, 1926.
GRACE F. KAECHER,
Clerk

WELLS-DICKEY TRUST COMPANY, as Special Administrator of the Estate of Elmer E. Anderson, Deceased,
Respondent, 8

24936 —VS—

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
Appellant.

SYLLABUS

1. In a death action under the Federal Employers' Liability Act, the jury was justified in finding that a sister of the employee was dependent on him, although she was of age, free from physical or mental disability, and capable of earning her own livelihood, it being made to appear that, at her brother's request, she had given up an independent 9 occupation to manage his household and care for their mother, and that she regularly received from him money for her support and for the maintenance of the family.

2. Dependency is to be determined from the facts and circumstances of each particular case. It may exist although there was no actual necessitous want on the part of the alleged dependent, if he or she received support from one who furnished it voluntarily and who might reasonably be expected to continue to do so.

Affirmed.

10

OPINION

This case has been here before and is reported in 159 Minn. 417, 199 N. W. 101, to which reference is made for an outline of the facts.

It was there held that the plaintiff, after the death of the mother of the deceased employee, might maintain this action for the benefit of the employee's sister.

But two questions were litigated at the second trial: (1) Was the sister dependent on her brother at the time of his death? (2) If she was, what pecuniary loss did she sustain? Defendant rested without introducing any evi-
11 dence and moved unsuccessfully for a directed verdict. Both questions were submitted to the jury and a verdict returned for $4,700. This appeal is from the judgment.

The errors assigned are the refusal to direct a verdict and the denial of the motion for judgment notwithstanding the verdict. Both motions were based on the alleged failure of proof of the sister's dependency within the meaning of Sec. 8657, U. S. Comp. Stat. 1918, which reads in part as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering in-
12 jury while he is employed by such carrier in such commerce, or in case of the death of such employe to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe, and, if none, then of such employe's parents, and, if none, then of the next of kin dependent upon such employe."

The evidence showed that the Anderson family lived at Creston, Iowa, and that Ada C. was a member of the family until she became nineteen years of age, when she went to Chicago, where she obtained employment and supported herself for a period of about six years. In the meantime

her father died, her mother, with a younger daughter and 13
the son Elmer E. remaining in the old home. The mother's health became impaired and Elmer decided to induce Ada to return and take charge of the household and care for the mother. He went to Chicago in 1916 or 1917 and had a conversation with Ada, heard by a disinterested witness, who testified that he asked Ada to come home and "take care of the house and he would pay her a great deal more money than she could earn in Chicago, and in the event of the mother passing out, if she would still keep his home, she could depend on him for the future. * * * After the mother passed away she could still depend on him for her living and that he would look after her future." Following this 14
conversation Ada gave up her position in Chicago, went home and managed the household and cared for her mother for about four years. Soon after her return her sister died and, on November 1, 1920, when Elmer lost his life, he and Ada and their mother constituted the family. From the time of Ada's return until November 1st, Elmer provided for the maintenance of the home and for her support. After his death and the death of her mother, Ada returned to Chicago, where she was earning a livelihood at the time of the trial.

Appellant contends that, because Ada was able to sup- 15
port herself when she left home for the first time, is supporting herself again, and has no physical or mental disability, she was not dependent on her brother at the time of his death.

Webster's Dictionary defines a dependent as "one who depends; one who is sustained by another, or who relies on another for support or favor." Ada was sustained by her brother and relied on him for support, and was dependent under this definition. But, of course, general definitions of a word contained in a statute do not control the inter-

16 pretation of the statute, for it is always the duty of a court to ascertain, if possible, the sense in which the word was used by the lawmakers and to give it the meaning intended.

The statute under consideration designates three classes of beneficiaries: (1) The surviving spouse and children of the employee; (2) the employee's parents; (3) next of kin dependent upon the employee. One in the first or second class has a right of recovery if he or she is shown to have sustained some pecuniary loss because of the death of the employee. Gulf &c. Ry. Co. vs. McGinnis, 228 U. S. 173. "The pecuniary loss is not dependent upon any liability of the employee to the beneficiary. That is not the sole test. 17 There must, however, appear some reasonable expectation of pecuniary assistance or support of which they have been deprived." Mich. Cent. Rd. Co. vs. Vreeland, 227 U. S. 59. See also Moffett vs. B. & O. Rd. Co., 220 Fed. 39.

Where the action is brought for the benefit of a member of the third class, dependency must be shown. There are cases holding that there is no dependency unless there was actual necessitous want on the part of the beneficiary and a recognition of that necessity on the part of the decedent. Duval vs. Hunt, 24 Fla. 85, is the leading case, and the opinion contains this language:

18 "A person who bases his right of recovery on the fact that he is dependent upon the deceased for support * * * must show, regardless of any ties of relationship or strict legal right to such support, that he or she was, either from the disability of age, or nonage, physical or mental incapacity, coupled with the lack or property means, dependent in fact upon the deceased for support. There must be, when adults claim such dependence, an actual inability to support themselves, and an actual dependence upon some one else for support, coupled with a reasonable expectation of support, or with some reasonable claim to support from the deceased."

So. Ry. Co. vs. Vessell, 192 Ala. 140, Ann. Cas. 1917D 892, 19
and Bortle vs. N. P. Ry. Co., 60 Wash. 552, Ann. Cas. 1912B
731, quote this statement with approval, and appellant asks
us to apply the doctrine of these cases to the facts in the
case at bar. We must decline to do so for these reasons:

Whether a person is dependent on another is essentially
a question of fact to be determined from the circumstances
of the particular case. If the evidence furnishes a reason-
able basis for the conclusion of partial or total dependency,
a jury may find for the plaintiff and award damages com-
mensurate with the pecuniary loss suffered. One of the cir-
cumstances to be considered is whether the person for whose
benefit the action is brought had a reasonable expectation 20
of support from the deceased. Was she being supported by
him in whole or in part? Did he provide for her support
regularly or irregularly? For how long a time had he sup-
ported her? These are some of the questions to be consid-
ered in determining whether or not the beneficiary was de-
pendent on the deceased, had a well founded expectation of
support, and suffered a pecuniary loss by reason of his
death. In re Carroll, 116 N. E. 844.

We think it cannot be said that an adult, free from dis-
ability and capable of earning a livelihood, can never be
dependent on another. It is a matter of common knowledge
that women are sometimes supported by near relatives, able 21
and willing to provide a home for them. A woman in that
situation is freed from the necessity of becoming a wage-
earner. By following some gainful occupation for which
she is fitted, she may be able to earn enough to pay for food,
shelter and clothing, but that fact does not demonstrate that
she is not a dependent. A sister may be under no contract to
live with a brother and manage his household affairs for
him, and he under none to continue to provide her with a
home, but, as long as he does, she is dependent on him and,

22 when his death cuts off that source of support, she suffers a pecuniary loss, and compensation under the statute is the substitute for that which she has lost.

Our attention has not been called to any case directly in point. In construing Workmen's Compensation Acts, the courts have often had occasion to consider the meaning of the word "dependent." See notes in Ann. Cas. 1918B 749 et seq.; 13 A. L. R. 686; 30 A. L. R. 1253 and 35 A. L. R. 1066. See also Herrick's Case, 217 Mass. 111, Kenney's Case, 222 Mass. 401, and Blanton vs. Wheeler & Co., 91 Conn. 226. These cases point to the conclusion we reach in

23 holding that a finding of dependency was permissible under the circumstances of the present case, and in adopting, as the true test of dependency, actual support rather than inability on the part of the alleged dependent to earn a livelihood.

Judgment affirmed.

24

No. 193 Hennepin County Per Curiam. 25

Endorsed

Filed February 19, 1926.

GRACE F. KAERCHER,
Clerk.

WELLS-DICKEY TRUST COMPANY, as Special Administrator of the Estate of Elmer E. Anderson, Deceased,

Respondent,

24936 —VS.—

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, 26

Appellant.

PER CURIAM

One ground of the defendant's motion for a directed verdict was that the sister of the deceased was not a beneficiary under the statute, his mother living at his death but dying before action brought, and that the action could not be maintained; and error is assigned in the denial of such motion and the motion for judgment notwithstanding the verdict. The question was considered on the former appeal and is again pressed by the defendant. We hold that the 27
sister was a beneficiary within the federal act, and that there could be a recovery if she was in fact a dependent. So far as we are advised but one case, Kerner vs. Mississippi &c. 158 La. 863, involving a similar statute, has arisen since. The conclusion there reached is not in harmony with that adopted by us. The contention of the defendant has been considered again on this appeal, we adhere to the decision made on the former one, and the judgment is affirmed.

28 STATE OF MINNESOTA, SUPREME COURT

WELLS DICKEY TRUST COMPANY, as Special Administrator of the Estate of Elmer E. Anderson, Deceased,

Respondent,

24936 —VS.—

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,

Appellant.

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the Judgment of the Court below, herein appealed from, to

29 wit, of the District Court within and for the County of Hennepin be and the same hereby is in all things Affirmed.

And it is further determined and adjudged that Respondent herein, do have and recover of Appellant herein the sum and amount of Forty and 20/100 Dollars ($40.20) costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed Feb. 10, A. D. 1926.

BY THE COURT

Attest:

GRACE F. KAERCHER,

30 Clerk.

STATEMENT FOR JUDGMENT

Statutory costs, $25.00.

Printer, $15.20.

Total, $40.20.

STATE OF MINNESOTA }
} ss.
SUPREME COURT }

I, Grace F. Kaercher, Clerk of said Supreme Court, do

hereby certify that the foregoing is a full and true copy of 31
the Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at the Capitol, in the City of St. Paul, February 10, A. D. 1926.

GRACE F. KAERCHER,

Clerk.

Filed February 10, A. D. 1926.

GRACE F. KAERCHER,

Clerk. 32

(SEAL)

34 IN THE SUPREME COURT OF THE
STATE OF MINNESOTA

PRAECIPE

WELLS DICKEY TRUST COMPANY, as Special Administrator of the Estate of Elmer E. Anderson, Deceased,

Appellant,

23948 —VS—

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,

Respondent

35 WELLS DICKEY TRUST COMPANY, as Special Administrator of the Estate of Elmer E. Anderson, Deceased,

Respondent,

24936 —VS—

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,

Appellant

TO THE CLERK OF THE ABOVE ENTITLED COURT

You are hereby requested to make transcript of the record of this cause to be used in an application to the Supreme Court of the United States for a Writ of Cer-
36 tiorari in said cause, the transcript to consist of

The record on appeal in said cause;

ASSIGNMENTS OF ERROR

The opinion of the Supreme Court of the State of Minnesota;

All the records and proceedings of the Supreme Court of the State of Minnesota relating to said cause;

The final judgment and decision of the Supreme Court of the State of Minnesota;

Your certificate to the record that it is a complete rec- 37
ord in said cause.

Dated this 22nd day of April, 1926.

DENEGRE, McDERMOTT & STEARNS,
Attorneys for Chicago, Burlington
and Quincy Railroad Company.

38

39

40 IN THE SUPREME COURT OF THE
STATE OF MINNESOTA

WELLS-DICKEY TRUST COMPANY, a Corporation, as Special Administrator of the Estate of Elmer E. Anderson, Deceased,

Appellant

23948 —VS—

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,

Respondent

WELLS DICKEY TRUST COMPANY, a Corporation, as Special
41 Administrator of the Estate of Elmer E. Anderson, Deceased,

Respondent,

24936 —VS—

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,

Appellant

CLERK'S CERTIFICATE TO RECORD

I, Grace F. Kaercher, Clerk of the Supreme Court of the State of Minnesota, do hereby certify that the foregoing, consisting of 117 numbered pages, is a true and complete transcript of the record on appeal to this court, comprising the record on appeal from the District Court of
42 the Fourth Judicial District in and for Hennepin County to this Court, opinion of this court thereon, final judgment of this court on said appeal and praecipe for preparation of said record.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the Court, this 23rd day of April, 1926.

GRACE F. KAERCHER,
Clerk of the Supreme Court
of the State of Minnesota.

(SEAL)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 1, 1926

The petition herein for a writ of certiorari to the Supreme Court of the State of Minnesota is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

APR 20 1926

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1925.

No. 1[redacted]57

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,

Petitioner,

vs.

WELLS DICKEY TRUST COMPANY, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF ELMER E. ANDERSON, DECEASED,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO BE ADDRESSED TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

AND

BRIEF IN SUPPORT THEREOF

DENEGRE, MCDERMOTT & STEARNS,
J. A. CONNELL,
J. C. JAMES,
Attorneys for Petitioner.

BRUCE SCOTT,
Of Counsel.

BYRON S. ADAMS PRINTING COMPANY, WASHINGTON, D. C.

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Summary of Argument

I. Under the Federal Employers' Liability Act, Anderson's mother was the only person for whom a cause of action accrued at the time of his death. The sister was excluded

II. No suit was brought on the cause of action which accrued to the mother. The sister never had any right or interest in that cause of action. A new cause of action in favor of the sister could not arise by the death of the mother. Rights of beneficiaries must accrue at the time of the death of the employee or not at all

III. The opinion of the Supreme Court of Minnesota is not only in conflict with "the Numerical Weight of Authority," as it admits, but entirely disregards the meaning and effect of the words "if none" in the Act

IV. If Congress had intended the result reached by the Supreme Court of Minnesota, it would have said so

V. The evidence did not establish dependency necessary to establish a cause of action under the Federal Act

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,

Petitioner,

vs.

WELLS-DICKEY TRUST COMPANY, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF ELMER E. ANDERSON, DECEASED,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO BE ADDRESSED TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

I.

STATEMENT OF MATTER INVOLVED.

Your petitioner, Chicago, Burlington & Quincy Railroad Company, respectfully represents that the Supreme Court of the State of Minnesota has affirmed a judgment of Five Thousand and Eight Dollars and Ninety-eight Cents ($5,008.98) against petitioner, and in favor of respondent, in above entitled suit under the Federal Employers' Liability Act, for damages resulting from the death of Elmer E. Anderson, a fireman on petitioner's interstate train, who was instantly killed in a collision November 1, 1920. (R. 23-9, R. 112; 159 Minn. 417, 199

N. W. 101; Minn. ; adv. sheets, Northwestern Reporter, Vol. 207, p. 186.)

The facts are not in dispute. The controversies in the case are regarding the construction of that part of the Employers' Liability Act which provides that a railroad shall be liable, in case of the death of an employe, to his personal representative "*for the benefit of the surviving widow or husband and children of such employe; and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe.* * * *"

Elmer E. Anderson, the deceased, left no widow, child or father, but he was survived by his mother and by his brothers and sister. (R. 23.) It is undisputed that under the statute, on the death of Anderson, a cause of action accrued for the sole benefit of his surviving mother. (R. 29.)

March 14, 1921, four months after Anderson was killed, an administrator was appointed on his estate by the District Court of Union County, Iowa, where he lived and where his death occurred. (R. 10.) No suit was brought by this administrator for the benefit of the mother. (R. 29.)

May 5, 1921, six months after Anderson's death, his mother died. (R. 10.) Up to the time of her death no action had been brought on the cause of action created by the statute for her benefit. (R. 29.)

December 27, 1921, more than a year after Anderson's death, the Wells Dickey Trust Company of Minneapolis, Minnesota, was appointed by a Minnesota court as "special administrator" of the estate of Elmer E. Anderson, deceased (R. 18), and as such "special administrator" brought this suit in the District Court, Hennepin County, Minnesota, under the Federal Employers' Liability Act,

for damages for the death of Elmer E. Anderson, for the *benefit of the sister* (R. 6-10).

On motion of petitioner (R. 14, 15) the Trial Court dismissed the suit (R. 15), holding that at the time Elmer E. Anderson was killed, his mother was the only person for whose benefit an action could be brought under the Federal Employers' Liability Act, and, that as no such action had been brought for her benefit, a suit under the Federal Act, for his death, could not be maintained after her death, for the benefit of a dependent sister who had had no right under the statute at the time of his death. (R. 18).

From a judgment dismissing the case (R. 14), the administrator appealed to the Supreme Court of Minnesota, which Court reversed the judgment and held that the administrator might recover for the benefit of a dependent sister, regardless of the death of the mother. (R. 22-30, 159 Minn. 417, 199 N. W. 101). Justice Quinn dissented, stating that in his opinion, a surviving dependent relative must acquire rights under the Federal statute at the time of the death of the employe, or not at all. (R. 29.)

On transcript of this judgment of reversal by the Supreme Court (R. 30) the case was again tried in the District Court of Hennepin County. (R. 32 *et seq.*) Evidence was offered to show that the sister, an able-bodied woman, thirty-three years of age (R. 44) and of considerable business experience, had supported herself in clerical positions in the City of Chicago from 1910 to 1917, earning twenty-eight dollars ($28.00) or more a week (R. 70-76); that in 1917 the mother was in poor health and in need of care and the deceased Elmer E. Anderson, had gone to Chicago and persuaded the sister to return home to take care of her

mother and their home, by promising to pay her more money than she could earn in Chicago (R. 98-9). The sister testified that pursuant to this agreement she returned to the family home in Iowa, cared for her mother, and ran the household, the brother furnishing the money, and also paying her fifteen or twenty dollars per week (R. 55), paid semi-monthly (R. 56), as compensation for the services rendered her mother and brother (R. 61). It was conceded that if she had continued working in Chicago he would not have paid her anything (R. 62.) After the deaths of the mother and brother the sister returned to work in Chicago, where she was employed at the time of the trial. (R. 69.)

Petitioner contended that this bargain made by the sister, as consideration for her return home to keep house and care for her aged mother, was no more than a contract with her brother, such as might have been made with any competent housekeeper, and which his death terminated, and that such evidence did not establish dependency, within the meaning of the Federal Employers' Liability Act. (R. 77.)

The Trial Court overruled this contention of petitioner and the motions raising the point (R. 91), although stating that the question was not free from doubt (R. 100). Throughout the second trial petitioner again objected, by apt motions and exceptions (R. 43, 77, 89-91), to the maintenance of the suit for the benefit of the sister, because the right of action had vested in Anderson's mother at his death and was not transferred to the sister. Under the decision of the Supreme Court of Minnesota the Trial Court overruled all such objections and motions of petitioner. (R. 44, 91.) The case was submitted to a jury; there was a verdict for plaintiff and a judgment thereon, amounting, including interest and costs, to Five Thou-

sand and Eight Dollars and Ninety-eight Cents ($5,008.98). (R. 102.)

From this judgment petitioner appealed to the Supreme Court of Minnesota, assigning error on both points (R. 104, 77 and 89-90). The Court affirmed the judgment in an opinion filed January 29, 1926 (R. 106, Minn. , 207 N. W. Reporter advance sheets, p. 186), holding that the evidence of dependency was sufficient under the Federal Act and referring to its former opinion as disposing of the point that the mother's right of action was not transferred to the sister. On rehearing, the Supreme Court of Minnesota filed a *per curiam* opinion February 19, 1926 (R. 112, 207 N. W. Reporter advance sheets, p. 188) stating that the last mentioned point had been reconsidered but that the Court adhered to its former decision that the suit might be maintained for the benefit of the sister, notwithstanding the survival and subsequent death of the mother, who had been the sole beneficiary, and affirmed the judgment (R. 112).

Assignment of Errors.

On appeal from the judgment of the District Court of Hennepin County, your petitioner, by proper assignments, contended that reversible error was committed by the District Court in entering judgment because the suit could not be maintained for the benefit of the sister, after the cause of action had accrued to the mother under the Federal Act, and also because the evidence did not establish dependency within the meaning of the statute. (R. 104, 77 and 89-90.)

Petitioner respectfully represents that the Supreme Court of Minnesota, in affirming the judgment of the District Court, committed the same errors as did the District Court.

II.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT OF CERTIORARI.

Your petitioner respectfully submits that the Supreme Court of the State of Minnesota has decided in this case two Federal questions of substance, not heretofore determined by this court, to wit:

1. That a right of action under the Federal Employers' Liability Act accrued to a beneficiary of a succeeding class upon the death of a beneficiary of a preferred class, for whose exclusive benefit the cause of action existed at the time of the death of the employee.

2. That the evidence, which showed a mere contract of employment between a deceased railway employee and his sister, is sufficient proof of dependency, within the meaning of the Federal Employers' Liability Act.

Petitioner respectfully calls attention to the statement of the Supreme Court of Minnesota (R. 24) that this question of the right of a remote beneficiary under the Federal Employers' Liability Act has not been decided by either a Federal or State court, and the statement of the Supreme Court of Minnesota (R. 111) that the court's attention had not been called to any case directly in point on the question whether the relations between the deceased employee and his sister were sufficient to establish dependency under the Federal Act.

Petitioner respectfully submits that the wide application of the Federal Employer's Liability Act, governing liability for a large proportion of the deaths of railroad employees in the country, makes it of great importance for this Court to construe the provisions of said Act here in question, so that same may be clearly understood and uniformly enforced.

III.

PRAYER.

Your petitioner now prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Minnesota, and the Justices thereof, commanding the said court to certify and send to this court a full and complete record of the transcript and all the proceedings of said Supreme Court of the State of Minnesota in this cause entitled *Wells Dicken Trust Company as Special Administrator of the Estate of Elmer E. Anderson, deceased, respondent* v. *Chicago, Burlington & Quincy Railroad Company, appellant*, No. 23948 and No. 24936 on the docket of said Supreme Court of the State of Minnesota, to the end that this cause may be reviewed and determined by this court.

And your petitioner prays that the certified copy of the record and proceedings of said Supreme Court of the State of Minnesota, which is filed as a part of and as an exhibit to this petition, may be treated as a return to said writ of certiorari, and your petitioner prays that it may have such other and further remedies and relief in the premises as to this court may seem appropriate and in conformity with law; and that the judgment of said Supreme Court of the State of Minnesota in this case, and every part thereof, be reversed by this Honorable Court, and your petitioner will ever pray, etc.

This is the first application for writ of certiorari in this cause.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,

By _____

Attorneys for Petitioner.

Of Counsel.

J. C. JAMES, being duly sworn, makes oath that he is attorney for petitioner in the above cause and that he has prepared the foregoing petition and that the allegations therein are true as he verily believes.

Subscribed and sworn to before me this 25th day of April, 1926.

Notary Public.

In my opinion the foregoing petition is well founded in law.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,

Petitioner,

vs.

WELLS DICKEY TRUST COMPANY, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF ELMER E. ANDERSON, DECEASED,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO BE ADDRESSED TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

OFFICIAL REPORTS OF THE OPINIONS DELIVERED IN THE COURT BELOW.

Opinion filed May 29, 1924, reported 159 Minn. 417; 199 N. W. Rep. 101. (R. 22-31.)

Opinion filed January 29, 1926, reported ... Minn. ; 207 N. W. Rep. Adv. Sheets 186. (R. 106-111.)

On rehearing *per curiam* opinion filed February 19, 1926, reported 207 N. W. Adv. Sheets p. 188. (R. 112.)

Grounds on Which Jurisdiction of This Court Is Invoked.

1. The date of the judgment of the Supreme Court of Minnesota to be reviewed.

The opinion of the Supreme Court of Minnesota affirming judgment of the District Court, was filed January 29, 1926 (R. 106), and supplemented by *per curiam* opinion filed February 19, 1926 (R. 112), although the date of the judgment is February 10, 1926. (R. 113.)

2. The specific claims advanced, and rulings made in the lower court which are relied upon as a basis of this court's jurisdiction.

Order of Trial Court in first trial sustaining petitioner's motions for dismissal and judgment on the ground that there could be no recovery in favor of the sister because the mother was the only person for whose benefit an action might have been brought at the time plaintiff's intestate was killed. (R. 18.)

Reversal of the judgment by the Supreme Court of Minnesota on the ground that the Trial Court had improperly construed said Employers' Liability Act. (R. 22-29.)

Respondent's motions at the opening and close of the evidence in the second trial, for dismissal and directed verdict in its favor on the ground that under the complaint and admitted facts plaintiff had failed to establish a cause of action, because it appeared that deceased left a mother, a member of the second class of beneficiaries under the Federal Act; that the parties were engaged in interstate commerce and were governed by the Federal Act; that de-

ceased left no wife or children; that the mother survived him and the cause of action vested in her, and that when she died in May, 1921, the cause of action died with her. And on the further ground that plaintiff failed to show any dependency within the purview of the Federal Act. (R. 43, 77.) Which motions were denied by the Court and petitioners excepted. (R. 44, 77.)

Petitioner's motion to set aside the verdict of the jury and enter judgment in favor of defendant notwithstanding the verdict, because the verdict was not justified by the evidence, was contrary to law and because the Court should have granted defendant's motion for a directed verdict in its favor made at the close of all the evidence. (R. 89-90.) Order denying said motion. (R. 91.)

Assignments of error for denial of these motions. (R. 104.)

Opinion of the Supreme Court of Minnesota filed January 29, 1926, holding that the evidence of the relation of the sister and the deceased employee was sufficient in law to establish dependency under the Federal Employers' Liability Act. (R. 106.)

Per curiam opinion of the Supreme Court of Minnesota, on rehearing, filed February 19, 1926, as follows:

> "One ground of the defendant's motion for a directed verdict was that the sister of the decedent was not a beneficiary under the statute, his mother living at his death, but dying before action brought, and that the action could not be maintained; and error is assigned in the denial of such motion and the motion for judgment notwithstanding the verdict.
>
> The question was considered on the former appeal and is again pressed by the defendant. We hold that the sister was a beneficiary within the federal act, and that there could be a recovery if she was in fact a dependent. So far as we are ad-

vised, but one case, *Kerner* v. *Trans Mississ*
Terminal R. Co. 158 La. 853, 104 So. 740, involvin
similar statute, has arisen since. The conclus
there reached is not in harmony with that adop
by us.

The contention of the defendant has been con
ered again on this appeal, we adhere to the deci
made on the former one, and the judgment is
firmed." (R. 112.)

3. STATUTORY PROVISION UNDER WHICH THIS COURT'S JU
DICTION IS INVOKED.

Sec. 237 (b) of the Judicial Code, as amended F
ruary 13, 1925, (Chap. 229, Laws 68th Cong. 2nd S
sion).

4. CASES BELIEVED TO SUSTAIN THE JURISDICTION OF T
COURT.

Reading Company v. *John L. Koons*, in which
court granted writ of certiorari to the Supreme Co
of Pennsylvania, January 5, 1925 (266 U. S. 600). D
sion of this court reversing the Supreme Court of Pe
sylvania on construction of Federal Employers' Liabi
Act, filed April 12, 1926.

Minneapolis, St. P. & S. S. M. R. Co. v. *Ernest*
Gotsch, writ of certiorari to the Supreme Court of
State of Minnesota granted June 9, 1924 (265 U. S. 5
Decision of this Court, affirming judgment of the
preme Court of Minnesota construing the Federal E
ployers' Liability Act and the Safety Appliance
filed January 4, 1926.

STATEMENT OF THE CASE.

Petitioner respectfully refers to "Statement of M
ter Involved," set forth in the foregoing Petition

Certiorari, pages 1 to 5, which statement of the case is incorporated herein by reference.

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE ARGUED.

1. The Supreme Court of Minnesota erred in holding that this suit might be maintained for the benefit of the sister notwithstanding the fact that the mother was living at the time of Anderson's death, and, therefore, sole beneficiary under the Act.

2. The Supreme Court of Minnesota erred in holding that the evidence, showing a mere contract of employment between plaintiff's intestate and his sister, was sufficient proof of dependency under the Federal Employers' Liability Act.

ARGUMENT.

I.

UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT, ANDERSON'S MOTHER WAS THE ONLY PERSON FOR WHOM A CAUSE OF ACTION ACCRUED AT THE TIME OF HIS DEATH. THE SISTER WAS EXCLUDED.

The statute is as follows:

> "SECTION 1. Every common carrier by railroad while engaged in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, *or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee*," etc. (35 Stat. L. 65; 36 Stat. L. 291.)

Anderson left no widow, child or father; the mother, as the only surviving parent, was the sole beneficiary under the statute. The brothers and sister were excluded. It is conceded by respondent, and the Supreme Court of Minnesota, that the sister for whom judgment has been given in this case, had no right to or interest in the cause of action for Anderson's death *at the time his death occurred and the cause of action thereon accrued to the mother.*

The Supreme Court of North Carolina said, in the case *In re Stone*, 173 N. C. 208, 91 S. E. 852:

> "The Federal Employers' Liability Act provides

that the action shall be brought by the personal representative of deceased employee 'for the benefit (1) of the surviving widow, or husband and children of such employee; and, if none, then (2) of such employee's parents, and, if none, then (3) of the next of kin dependent upon said employee'; the said Federal statute thereby creates three classes which are separate and distinct from the other. If there is any member of the first class, the other two are excluded. If there is none of the first class, but one or more of the second, then the third class will be excluded. If any member of the last class does not come under the provision 'dependent upon such employee' (*Allen J. Dooley* v. *R. R.*, 163 N. C. 454, L. R. A. 1916 E., 185), then such person is excluded from that class, and if such exclusion should apply to the whole of that class, then there can be no recovery."

In *Taylor* v. *Taylor*, 232 U. S. 363, the Court held that a widow is entitled to the entire amount recovered for death of her husband, in an action under the Federal Act, to the exclusion of his parent.

It is equally well settled that the action given by the statute is not for the benefit of the estate of the deceased employee. (*Louisville & N. R. Co.* v. *Stewart*, 241 U. S. 261.)

II.

NO SUIT WAS BROUGHT ON THE CAUSE OF ACTION WHICH ACCRUED TO THE MOTHER. THE SISTER NEVER HAD ANY RIGHT OR INTEREST IN THAT CAUSE OF ACTION. A NEW CAUSE OF ACTION IN FAVOR OF THE SISTER COULD NOT ARISE BY THE DEATH OF THE MOTHER. RIGHTS OF BENEFICIARIES MUST ACCRUE AT THE TIME OF THE DEATH OF THE EMPLOYEE, OR NOT AT ALL.

Anderson was killed Nov. 1, 1920; his mother died May 14, 1921; during her lifetime no suit was brought

on the cause of action for her benefit. The respondent was appointed "special administrator" of Anderson's estate Dec. 27, 1921, and brought this suit, not for the benefit of the mother, not for the benefit of the estate of the mother on account of damages sustained prior to her death, and not on the cause of action which had accrued when Anderson was killed, but on another cause of action, a supposed new cause of action for the benefit of the sister.

The sister had no interest in the cause of action at the time Anderson was killed. She had no interest in it during the life of her mother. Surely the death of the mother could not give the sister rights not conferred by the Federal Statute. The decision of the Minnesota Court is, in effect, that on the death of the mother a new cause of action arose in favor of the sister. Such interpretation of the Federal Statute disregards and nullifies the controlling words "*or none*." It is not the death of the mother which gives the cause of action; it is the death of the employee. Under the Statute, the rights of beneficiaries must accrue at the time of the death of the employee, or not at all.

We have been unable to find any decision of this or any other court, in which the claim of a remote beneficiary, under the Federal Employers' Liability Act, as in this case, has been passed upon. However, there are a number of authoritative and well reasoned state court decisions, and one Federal Court decision by Justice Lurton, then Circuit Judge, construing state statutes which have like provisions.

Probably the leading case is *Woodward v. Chicago & Northwestern R. Co.* 23 Wis. 400, an action by an administrator for the benefit of a surviving husband, for damages resulting from the death of his wife

Sometime after the suit was commenced the husband died. The court held that upon the death of the wife the right of action, by statute, vested solely and exclusively for the benefit of her husband; that he alone was entitled to the amount recovered; that the lineal descendants of deceased had no interest whatever in the action, and that the action could not be prosecuted for the benefit of an infant child. The court said, p. 403:

> "With respect to the persons to be benefited by the money recovered in an action of this nature, the statute of this state differs materially from that of New York, and from the English statute, 9th and 10th Victoria, chapter 93. The New York statute provides, that 'the amount recovered shall be for the exclusive benefit of the widow and next of kin, and shall be distributed in the proportions provided by law in relation to the distribution of personal property left by an intestate.' The English statute declares, 'that every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused.' The statute of this state reads as follows: 'And the amount recovered shall belong and be paid over to the husband or widow of such deceased person, if such relative survive him or her; but if no husband or widow survive the deceased, the amount recovered shall be paid over to his or her lineal descendants, and to his or her lineal ancestors in default of such descendants; and in every action the jury may give such damages, not exceeding five thousand dollars, as they shall deem fair and just in reference to the pecuniary injury resulting from such death to the relations of the deceased specified in this section.' By all the statutes, the action must be brought in the name of the personal representative of the deceased—that is, the executor or administrator. Now, while it is apparent, under the English and New York statutes, that the right of action vests at once for the benefit of each and all of the persons entitled to receive any part of the money recovered, and may be maintained so long as any one of such persons survives, it is equally apparent by our stat

ute, that it vests only for the benefit of the husband or widow, in case the deceased leaves such surviving relative; and if no such relative survives at the time of the death, the action may be prosecuted for the benefit of the lineal descendants of the deceased; and in default of these, then for the benefit of his or her lineal ancestors. * * *

"The position that the action does not abate because the nominal plaintiff, the administrator, still lives and is ready and willing to prosecute it, seems scarcely worthy of serious thought. The administrator is a mere trustee, so made by the statute, with power to sue for the benefit of his *cestui que trust*, or the person beneficially interested. He has no right except in virtue of the right of the real party in interest, and if the right of that party is lapsed or lost, so that no recovery can be had upon it, it follows that the action can be no longer maintained. As already observed, whether there is a person in being entitled, under the statute, to the money recovered, and whom the administrator represents, is one of the facts in issue, which must be proved before any recovery can be had. It appears that the person so entitled died, and that the right of action expired with him; and for that reason, if for no other, the judgment of nonsuit must be affirmed."

Another leading case is *Bean* v. *L. & N. R. Co.* 94 Tenn. 388, 29 S. W. 370, an action by an administrator to recover damages for the benefit of a widow, under the statute of Tennessee, which at that time provided that a right of action for wrongful death should pass to decedent's widow, or his personal representative for the benefit of his widow, *or, if there is no widow, for the benefit of his next of kin.* After trial of the case and appeal to the Supreme Court of Tennessee, the widow for whose benefit the suit was brought died, and defendant moved to abate the suit on account of her death. The Supreme Court said, page 371, that the question presented by this motion was whether the right of action is *limited to those entitled to the recovery at the death*

of the deceased, or whether, upon the death of those then entitled, the cause of action survives, and reverts in the next of kin in the line of distribution.

At page 372 the court said:

> "We think the exclusive statutory beneficiary was that person or class of persons who were entitled to the recovery at the death of deceased, when the cause of action accrued. In this case it was the widow, and, in the language of the statute, the right of action passed to her, or to the administrator, for her benefit. The right of recovery having once vested in the widow, it did not pass upon her death to her personal representative, neither did it revest in the next of kin of deceased, for the reason that no provision is made in the statute for such contingency. The cause of action, upon the death of the person to whom it survived, or for whose benefit it might be prosecuted, was thereby extinguished."

In closing the opinion the court said (page 372):

> "Had there been no widow and children at the death of the intestate, the right of action would have passed to the father, or rather to the personal representative, for the benefit of the father, or in the event the deceased left no father surviving him, the suit would be prosecuted for the benefit of the next of kin living at the death of deceased. The right of action, however, does not pass to any person, or survive to any beneficiary, excepting those *appointed in the statute as entitled to the recovery when the cause of action accrued.*" (Italics ours.)

A case of importance because the opinion was delivered by a distinguished jurist, Justice Lurton, then a Circuit Judge, is *Sanders' Admr. v. L. & N. R. Co.*, 111 Fed. 708, in which the Circuit Court of Appeals of the Sixth Circuit, Judges Lurton, Day and Severens, passed upon the death statute of Tennessee in an action for the death of plaintiff's intestate. The father of deceased was entitled to the sole benefit of any recovery in the case, but the father died during the pendency

of the suit. The court held that the cause of action abated with the death of the beneficiary. In delivering the opinion of the court Judge Lurton said, page 709:

> "The next of kin for whose benefit the right of action survives are the real plaintiffs, and the administrator, though made a necessary party plaintiff by the statute, is nevertheless a mere trustee and a nominal party. *Webb* v. *Railway Co.*, 88 Tenn. 119, 128, 12 S. W. 428; *League* v. *Railroad Co.*, and *Railway Co.* v. *Lilly*, cited above; *Railway Co.* v. *Hooper*, 35 C. C. A. 25, 26, 92 Fed. 820. * * * *Inasmuch as the right of action survives only for the benefit of the beneficiaries designated in the statute, it is essential that the plaintiff's declaration show that the suit is brought for the use and benefit of a statutory beneficiary in existence when the right of action accrued.*" (Italics ours.)

Hammond v. *Lewiston, A. & W. Ry.*, 106 Maine, 209, 76 Atl. 672, was a suit by an administrator for damages resulting from the death of plaintiff's intestate, brought for the benefit of his sister. Deceased left a widow, who died before the suit was brought. The only question before the court was whether the action could be maintained for the benefit of the sister.

The controlling provisions of the Maine statute for death by wrongful act, as quoted by the Supreme court, p. 673, are as follows:

> "SEC. 10. Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of his widow, if no children, and of the children, if no widow, and if both, then of her and them equally, and if neither, of his heirs. * * *"

The court said:

> "In other words, the plaintiff's position is that the administrator is given a right of action in any event, and the beneficiaries should be determined, not as

of the date of the death, but of the recovery. Such a construction cannot be adopted. * * *

"The language of the statute under consideration is plain and unambiguous. Some beneficiary named therein must exist at the time of the death of the deceased, otherwise no right of action arises. The suit is not for the benefit of the estate, and creditors have no interest in it. True, such suit is brought in the name of the administrator, but he is merely the nominal party and acts as trustee. The Legislature could have given the right directly to the widow or children or heirs, had it seen fit to do so, as the Legislatures of some states have done. But if none of the beneficiaries exists at the time of the death, no right of action is created. *Ea. Tenn. R. R. Co.* v. *Lilly*, 90 Tenn. 563, 18 S. W. 243; *Cooper* v. *Shore Electric Co.*, 63 N. J. Law, 558, 44 Atl. 633; *Topping* v. *St. Laurence*, 86 Wis. 526, 57 N. W. 365. * * *

"Under section 10, the party for whose benefit the action is brought depends upon the nature of the family that is left and four different conditions are provided for. * * * But in any event the immediate, absolute, and final vesting of the right occurs at the time of the decease, not at the time of bringing suit or of recovery. The beneficiaries have a right of action then or not at all and the facts of each particular case determine which beneficiaries have the right. If there is a widow as here, she has the sole and exclusive right. It belonged to her immediately upon the death of her husband and could not be transferred to any other beneficiary either by her death or failure to bring suit. The statute provides for several possible claimants, but the facts in each case determine which of them is the actual and sole claimant. There is no life interest in the widow with a remainder over to the heirs at law. One action is granted, not several. When the husband died the sister had no cause of action, and the death of the widow has not given her one. * * *

"Again the cause of action accrues at death by the very terms of the statute. The last clause of section 10 makes the two year limitation within which suit can be brought, begin at that time. Whoever has a cause of action under this statute has two years

> within which to bring it. Can it be that if a widow is left who survives her husband one year and eleven months, the heirs would then have a right of action but only one month in which to enforce it? The absolute vesting of the right in some beneficiary at time of death is further apparent from the fact that the damages vary according to the relationship of the deceased to the beneficiary and the dependence of the latter upon the former. 'The injury for which damages can be recovered must be wholly to the beneficiaries themselves and limited to the pecuniary effect of the death upon them.' *McKay* v. *Penobscot Co.*, 92 Me. 454, 43 Atl. 29. The pecuniary effect of the death of a husband upon his widow, and therefore the damages recoverable in an action for her benefit would differ materially from the pecuniary effect of his death upon remote heirs at law, and from the damages recoverable by them."

Dillon v. *C. C. C. & St. L.*, 34 Ind. App. 52, 72 N. E. 271, was a suit by an administrator under the Indiana statute to recover damages for the death of plaintiff's intestate, who left surviving a widow and three brothers. The widow died while the suit was pending and attempt was made to carry it on for the benefit of the brothers.

The court said at page 273:

> "The action must be brought, and must be maintained to the end, by the personal representative of the person for whose wrongful death the damages are sought. He pursues the remedy, not for the benefit of his decedent's estate, but as a convenient trustee specially designated by the statute to recover and distribute the damages for the beneficiaries recognized as such by the statute. Of these there are two classes: First, the widow and children, if there be such persons; and, second, other persons who are next of kin to the person, for whose wrongful death the action is maintained. If there be persons entitled to damages of this first class, the damages would be awarded for the exclusive benefit of such persons. Persons of the second class would not be entitled to damages, and there could be no recovery for their

> benefit, if there were persons entitled of the first class. The right of action accrues upon the death of the intestate. The widow of the appellant's intestate survived him, and there being no children, the right of action existed for her benefit alone, and there never was any right of action for the benefit of the brothers or 'next of kin' of the intestate."

Since the first decision of the Supreme Court of Minnesota in this case the Supreme Court of Louisiana has construed a statute of that state which is similar to the Federal Employers' Liability Act, in the case of *Kerner et al. v. Trans Mississippi Terminal R. Co.*, 158 La. 853, 104 So. 740, referred to in the *per curiam* opinion of the Minnesota Court. (R. 112.) The suit was for damages for the death of plaintiff's brother, who was survived by his mother and the plaintiffs' in the suit, a brother and five sisters. Under the Louisiana code the mother alone had a prior right of action for damages for his death. She brought suit but died before it was tried. Thereafter the brother and sisters brought suit. The Supreme Court of Louisiana held that in accord with the language of the statute, necessary implication, and the general rule, such a right of action is abated by the death of a person having the right; that the statute declared that the right of action accrued to brothers and sisters only in cases where there was no surviving spouse or child or parent; that the right of action belongs to the preferred survivors only, to the exclusion of any and all other survivors, and that if one of the survivors, who has thus acquired the right of action, dies afterwards, his death does not confer the right of action upon any other survivor; that the right of action is not transmissible from one survivor to another by virtue of the statute.

The Louisiana court points out the difference between

statutes like the original Lord Campbell's Act wher
beneficiaries are entitled to recover jointly, from sta
utes where beneficiaries are placed in different classe
one class not being entitled to recover as long as ther
are members of a preceding class. Where the bene
ficiaries are entitled to recover jointly the death of on
beneficiary in no way affects the right of the other bene
ficiaries to recover; but where the beneficiaries are i
different classes a right of action does not arise in th
succeeding class because of the death of the members o
the preceding class.

In *Frazier v. Georgia Railroad & Bank Company*, 9
Ga. 785, 22 S. E. 936, decided in 1895, the Supreme Cou
of Georgia, under a statute providing that "a mother, o
if no mother, a father, may recover for the homicide of
child," held that where the mother was living at the tim
of the death of the minor child, but she died prior t
bringing an action, the father of the child could n
bring an action for the death of the child.

In *Schmidt v. Menasha Woodenware Co.*, 90 Wis. 28
74 N. W. 797, the Wisconsin Court held that an action fo
death by wrongful act abates on the death of the pr
ferred beneficiary although a beneficiary of a more re
mote class survives.

In *Walton & Co. v. Burchel*, 121 Tenn. 715, 121 S. W
391, where a father and son were killed in the same acc
dent it was held a question of fact for the jury whethe
the father survived the son an appreciable period o
time; if he did, no recovery could be had in behalf of th
mother for the death of the son; if the father did no
survive, then recovery might be had for the mother.

In *Harvey v. Baltimore & O. R. Co.*, 70 Md. 329, 17 A
88, under a statute providing that action for death sha
be brought in the name of the state for the benefit of th

wife, husband, parent or child, it was held that where the husband died pending an action to recover damages in his behalf for death of his wife, the action could not be prosecuted in behalf of the children of deceased.

Wilcox v. *Warren Construction Co.*, 95 Or. 125, 186 Pac. 13, was an action for death under the Employers' Liability Act of Oregon. Deceased left surviving him his widow, who at the time was insane, and who died three months after he had been killed. The two plaintiffs were his minor children by a former wife. The Court held that the Oregon Liability Act gave priority to the widow if any, and, if none, a right of action to the children, and said:

> "The widow having been invested with a cause of action by the death of her husband, was at liberty to prosecute it or not. If she did, she was under no obligation to divide the proceeds with any of the decedent's other relatives. If she did not prosecute, either in her own proper person or by guardian, her cause of action died with her and did not pass to another, being personal to herself."

Although dissenting on the proposition that the Oregon statute separated the beneficiaries into distinct classes, Judge Bennett agreed that remote beneficiaries have no interest after the death of the first beneficiary, saying:

> "It seems to be well settled under the authorities that where the beneficiaries are grouped in different groups, and one group is given preference over another group, that the first group takes, to the exclusion of the latter one, and that, upon the death of all of the former group, the liability is extinguished."

In 8 Ruling Case Law, page 769, Section 52, it is said:

> "By the great weight of authority if the beneficiary first entitled to sue fail to bring the action, this will not transfer the right of action to other persons for whose benefit the action might have been maintained if the person first entitled had not been

> living when the right of action accrued. The reason for this view is that the statutes giving the right of action to specified persons are construed to create a single cause of action, which accrues immediately on the death of the decedent, and exists for the exclusive benefit of the beneficiary in whom the action vests, so that it cannot be transferred to any other beneficiaries by the death or failure of the first beneficiary to sue, since there never was any right of action for their benefit, in the absence of statute providing for such contingency."

In 17 Corpus Juris, p. 1232, section 78, it is said:

> "If a sole beneficiary or all the beneficiaries entitled at the time of decedent's death die, the right of action is extinguished; it does not pass to beneficiaries of the next class who would have been entitled to it if no one of the prior classes had survived the decedent."

It will be noted how frequently in the foregoing cases the courts have referred, in one way or another, to three propositions: *first*, that the right of action *accrues at the time of death*, *second*, that the administrator is but a *nominal party*, acting as trustee; and *third*, as said by Justice Lurton in the Saunders case, that those for whose benefit the right of action is given are the *real plaintiffs*.

In *Reading Co.* v. *Koons, Admr.*, decided April 12, 1926, (No. 213 Oct. Term, 1925) this court held that the cause of action under this statute *accrues at the date of death*, so that the limitation runs from that time; that the administrator *acts only for the benefit* of the persons specifically designated by the statute, who are identified persons for whose benefit the liability exists, and that *at the death of decedent there are real parties in interest*. In *Chicago, R. I. & P. Ry. Co.* v. *Schendel, Admr.*, decided the same day (No. 683 Oct. Term, 1925) this court held that suit by an administrator under the Federal Act was barred by judgment in another action against

the beneficiary, for the reason that, although the parties were not the same, the right to be enforced under the Federal Act in the suit by the administrator was the *right of the widow* and she was the real party in interest.

Thus the cases holding that, under similar statutes, the right of action accrues at the time of death to the beneficiary then entitled, and to the exclusion of more remote beneficiaries, are in accord with the decisions of this court as to the character of the rights created by such statutes, the time of their accrual and the persons in whom they vest.

III.

THE OPINION OF THE SUPREME COURT OF MINNESOTA IS NOT ONLY IN CONFLICT WITH "THE NUMERICAL WEIGHT OF AUTHORITY," AS IT ADMITS, BUT ENTIRELY DISREGARDS THE MEANING AND EFFECT OF THE WORDS "IF NONE" IN THE ACT.

The Supreme Court of Minnesota said:

> "We reach a different conclusion, though the numerical weight of authority accords with the Trial Court's ruling."

The Supreme Court of Minnesota relied upon two cases construing state statutes, one from South Carolina and the other from Ohio.

In *Morris v. Spartanburg R. G. & E. Co.*, 70 S. C. 279, 49 S. E. 854, the South Carolina Court disposed of the question in a short opinion, referring to but one case and that its own prior decision. The following remarkable statement is found in this opinion:

> "the award of damages for the wrongful death is the important matter; the manner of distribution is of secondary consideration."

Under such statutes the manner of distribution is of controlling importance; liability depends upon the existance of the specified beneficiaries.

This statement of the South Carolina Court plainly disregards the controlling words of the statute: "*if none*," which the court brushed aside under the guise of "liberal construction." It is an ancient doctrine of this court that where the language of a statute presents no ambiguity the court will not attempt to qualify the meaning by construction. (*Doe* v. *Considine*, 6 Wall. 458.)

Another curious feature of the South Carolina case is that although the father of deceased was referred to as the preferred beneficiary, he brought the suit as administrator *for the benefit of all the heirs at law of deceased* and the court said, in substance, that as all the brothers and sisters were named in the complaint the action should not abate for want of beneficiaries. Apparently this irregularity influenced the decision.

In the Ohio case on which the Minnesota court also relied (*Garrard* v. *Mahoning Valley Ry. Co.* 100 Ohio St. 212, 126 N. E. 53), the trial court and the Ohio Court of Appeals had held that the action did not survive the death of the widow for the benefit of the parents, but the Supreme Court of Ohio brushed aside the authorities with the statement that the decisions of other states brought to its attention were of little assistance because they merely construed particular statutes under consideration, and, said in substance, that it proposed to construe the Ohio statute to suit itself. The Ohio court stressed the idea that the cause of action vested in the administrator, saying:

> "By force of the statute the right to enforce the liability is not placed in the beneficiary."

and held that therefore it was the intention of the

legislature to provide an existing class of beneficiaries who should respond at the time the administrator instituted his suit. The Minnesota court adopted this theory of the Ohio court, stating (R. 26) that the Federal Act vests the right of action in the personal representative, and that under the Federal Act the beneficiary cannot sue.

This view is not in accord with the weight of authority or with the view of this court, as expressed in the recent cases of *Reading Co.* v. *Koons, Admr.*, and *Chicago, R. I. & P. Ry. Co.* v. *Schendel, Admr.*, hereinabove referred to. In the *Schendel* case this court reversed the Supreme Court of Minnesota on the very question of interest of an administrator under the Federal Act, this court holding that the administrator is but a nominal party while the beneficiary is the real party in interest.

In the *Koons* case this court said:

> "For while it is true that the executor or administrator is the person authorized to bring the suit, he nevertheless acts only for the benefit of the persons specifically designated in the statute. At the time of the death there are identified persons for whose benefit the liability exists and who can start the machinery of the law in motion to enforce it, by applying for the appointment of an administrator. This court has repeatedly held that a suit brought by such persons in their individual capacity is not a nullity within the provisions of the Act, and that if by amendment the plaintiff is properly described as executor or administrator of the decedent, even though the amendment is had after the expiration of the statutory period, the suit may be maintained and a recovery had under the statute. (Citing cases.) Thus at the death of decedent, there are real parties in interest who may procure the action to be brought; and there are no such practical inconveniences or necessary delays as would lead to the conclusion that the word 'accrued,' as used in the statute, can not be taken to refer to the time of death."

In this case the cause of action accrued at the time of Anderson's death. His mother was the person specifically designated in the statute; she was the identified person for whose benefit the liability then arose and existed; she was the real party in interest. What becomes of the two-year limitation, if another cause of action and with a different measure of damages accrues to the sister long after the death of the employee? The limitation, running from the time of death, precludes the possibility of the statute creating new causes of action for successive beneficiaries in turn.

When the cause of action accrued at Anderson's death the sister admittedly had no interest in it; having no interest under the statute, she could not acquire it otherwise; certainly not by or through the death of some other person.

IV

IF CONGRESS HAD INTENDED THE RESULT REACHED BY THE SUPREME COURT OF MINNESOTA, IT WOULD HAVE SAID SO.

The Federal Employers' Liability Act differs from Lord Campbell's Act and the statutes of some of the states, under which the right of action vests at once for the benefit of all beneficiaries, and damages are apportioned by the jury, or under the statutes of descent. (See *Michigan Cent. R. Co. v. Vreeland*, 227 U. S. 59, note page 69; *Woodward v. C. & N. W. Ry. Co.*, supra; and *Hammond v. L. & I. & W. S. R. Co.*, supra.)

This Court pointed out the distinction between the Federal Act and the Texas statute in *St. Louis Southwestern Railway v. Seale*, 229 U. S. 156, p. 158:

> "The Texas statute gave the right of action to the 'surviving husband, wife, children and parents'

> and provided that it might be enforced by all of them or by one or more for the benefit of all, while the Federal statute vested the right of action in the deceased's 'personal representative, for the benefit of the surviving widow or husband and children of such employe; and, if none, then of such employe's parents; and, if none, then of the next kin dependent upon such employe.''

By special statutory provision in Texas the amount recovered is divided among the beneficiaries who shall be living at the time of distribution. (*Houston & Texas C. Ry. Co.* v. *Moore*, 49 Tex. 31), and a Missouri mining statute specifically provides that where the widow dies within the period of limitations, the children may take (*Poor* v. *Watson*, 92 Mo. App. 89).

In some states, as Colorado and North Dakota, the statutes create distinct classes of beneficiaries but provide specifically that if the beneficiary of a class entitled does not exercise the right of action within a given time, the next class, after due notice, may be substituted. (*Hackman* v. *Northern Pac. Ry. Co.* 14 N. D. 69, 103 N. W. 412, *Hopper* v. *Denver & R. G. Co.* 155 Fed 273.)

The Alaska Code, hereinafter referred to, gives the right of action for the benefit of the *estate* of deceased.

These special statutory provisions giving rights to remote classes of beneficiaries, where there are preferred beneficiaries, emphasize the necessity of such positive enactments.

In enacting the Federal Employers' Liability Act, it must be assumed that Congress was familiar with the celebrated Lord Campbell's Act, which, as said by Justice Lurton in *Michigan Cent. R. Co.* v. *Vreeland*, supra, ''was the first act which ever provided for a cause of action arising out of the death of a human being, * * * and has been, in its distinguishing features, re-enacted in many of the states. * * *.''

Also it is to be assumed that Congress was famili
with different state statutes.

Statutes on death by wrongful act with priority clas
fication of beneficiaries, like Congress adopted in t
Federal Employers' Liability Act, had been in effe
many years prior to the passage of that act, and had be
construed in well reasoned opinions. The leading ca
of *Woodward v. Chicago & N. W. Ry. Co.*, 23 Wis. 4
above referred to, was decided in 1868. *Beach v. Louisv
& N. R. Co.*, 94 Tenn. 388, 29 S. W. 370, was decided
1895. Justice Lurton's opinion in *Sanders v. Louisv
Louisville & N. R. Co.*, 111 Fed. 708, was in 1901. T
Indiana case, *Dillon v. C. C. C. & St. L. Ry. Co.*, 32 N.
271, was decided in 1904.

At the time the Federal Employers' Liability Act w
passed in 1908, it was settled by the great weight of a
thority, that if a statute creates distinct classes of be
ficiaries, to-wit: beneficiaries living at the time of the
death of a preferred beneficiary for whose benefit t
cause of action has accrued at the death of the injur
person. Congress had authoritative construction of t
language which it selected for the Employers' Liabil
Act.

The fact that Congress did not adopt Lord Campbell
Act literally, but changed the language relating to be
ficiaries, manifests a plain intention of Congress to g
effect to whatever change of meaning that really result
therefrom. A change in phraseology creates a presum
tion of a change in intent. *Crawford v. Burke*, 1
U. S. 176, 180.)

The fact that Congress did not adopt the statutes
New York, Pennsylvania, Texas or other states wh
give an action for death for the benefit of all survivi
relatives, the proceeds to be distributed according to

laws of descent, indicates that it did not intend such distribution.

It did not adopt a statute like Colorado or North Dakota, specifically providing for substitution of a remote beneficiary, if the first beneficiary failed to enforce his or her cause of action.

If Congress had intended any such result as has been reached by the Supreme Court of Minnesota in this case, "it would have been easy to have said so," applying the familiar expression of this court in cases where efforts have been made to change the plain meaning of statutes. (*Tillson* v. *U. S.*, 100 U. S. 43, 46, *Baltimore & O. R. Co.* v. *Grant*, 98 U. S. 398, 403, *United States* v. *Detroit First N. Bank*, 234 U. S. 245.)

Congress having adopted the form of statute creating classes of beneficiaries, we respectfully submit that the authoritative construction of such statutes in the states where same had been in force for many years ought to be applied to the Act of Congress. It is a familiar rule that where a state statute is literally or substantially adopted by Congress, the judicial construction already placed upon it by the courts of the state where it originated accompanies the statute and is to be treated as incorporated therein. (*Capital Traction Company* v. *Hof*, 174 U. S. 1, 36; *Willis* v. *Eastern Trust Co.*, 169 U. S. 295; *Metropolitan R. R. Co.* v. *Moore*, 121 U. S. 558.)

In *Jennings* v. *Alaska Treadwell Coal Mining Co.* 170 Fed. 146, the Circuit Court of Appeals, Ninth Circuit pointed out that in enacting Sec. 353 of the Alaska Code (31 Stat. L. 392) giving an action for death by wrongful act, Congress adopted Sec. 381 of the Oregon Code; that two years before the adoption of the Alaska Code by Congress the like section of the Oregon Code had been construed by the Supreme Court of

Oregon, and the Circuit Court of Appeals applied the construction of the Oregon statute, by the Oregon court, to the section of the Alaska Code, under the principle that such construction was presumed to have been adopted with the statute, citing a large number of authorities.

V

THE EVIDENCE DID NOT ESTABLISH DEPENDENCY NECESSARY TO ESTABLISH A CAUSE OF ACTION UNDER THE FEDERAL ACT.

This judgment is in favor of a sister claiming as a beneficiary of the third class, "next of kin, dependent." Beneficiaries of the first and second class need show only reasonable expectation of support (*Mich. Cent. R. Co. v. Vreeland*, 227 U. S. 59), but to establish a right of action for a sister, actual dependency must be shown. (*M. Coll[illegible] v. Chicago, R. I. & P. Ry. Co.*, 100 Ia. 624, 142 N. W. 67; *Moffett v. Baltimore & O. R. Co.*, 229 Fed. 39; *Smith v. Price*, 195 Mo. App. 259, 190 S. W. 69; *Dooley v. Seaboard A. L. R. Co.*, 163 N. C. 454, 79 S. E. 970.)

In *Southern R. Co. v. Vessel*, 102 Ala. 140, 68 So. 336, it was held that a married sister of a deceased employee was not dependent, merely because she had a moral claim upon deceased or because he had been paying her regularly for her board.

In *Beattie v. Northern Pac. Ry.*, 60 Wash. 552, 111 Pac. 788, in passing on a claim by parents for the death of an adult son, under a statute conferring a right of action only on those dependent upon deceased, the court said:

> "This evidence does not, in our opinion, establish such a support or dependency as is contemplated by the statute. It shows nothing more than such gifts

as countless sons occasionally bestow upon their parents, with no thought of dependency, nor that it is a gift of necessity. Our statute means something more, while we would not give it such a strict construction as to say it means wholly dependent, or that the parents must have no means of support or livelihood other than the deceased, such a construction being too harsh and not in accordance with the humane purpose of the act. Nevertheless, there must be some degree of dependency, some substantial dependency, *a necessitous want on the part of the parent, and a recognition of that necessity on the part of the child.* Such we believe to be the general interpretation of like statutes.

"In *Darnell* v. *Hunt*, 34 Fla. 85, 15 So. 876, it is said:

'We think that when the suit is brought by a person who bases his right to recover upon the fact that he is dependent upon the deceased for support, then he must show, regardless of any ties of relationship or strict legal right to such support, that he or she was, either from the disability of age, or non age, physical or mental incapacity, coupled with a lack of property means, dependent in fact upon the deceased for a support. There must be, when adults claim such dependency, an actual inability to support themselves, and an actual dependence upon someone else for support, coupled with the reasonable expectation of support, or with some reasonable claim to support from deceased.'

"The evidence here does not bring respondents within the statute. They were in no sense dependent upon the deceased for support. The father was able to follow a daily vocation, and if his earnings only resulted in an average income of $40.00 per month, that was the result of his inability to sell more goods, and not his inability to solicit the sale. His necessity must not be judged from his unsuccessful effort to make a larger income, but from his physical ability to make the effort. Neither does an occasional contribution from a son to a parent establish a condition of dependency. There must be a substantial need on one side and a substantial financial recognition of that need on the other side, to

make out a dependency within the meaning of this statute."

By the weight of authority, evidence of contributions, where there is no evidence of actual necessity on the part of the beneficiary or where the evidence tends to show that the beneficiary was not actually dependent upon the deceased, does not show dependency within the statute. (*Trammell* v. *Southern R. Co.*, 182 Fed. 789; *Southern R. Co.* v. *Vessell*, 192 Ala. 440, 68 So. 336; *Atlantic Coast Line R. Co.* v. *McDonald*, 135 Ga. 635, 70 S. E. 249; *Georgia R. & B. K. G. Co.* v. *Sparks*, 111 Ga. 574, 36 S. E. 855; *Hoitnatt* v. *Boston & A. R. Co.*, 156 Mass. 86, 30 N. E. 224; *Bartle* v. *N. P. R. Co.*, *supra*.)

Where dependency and contributions are both essential elements to the right to recover, if one of these elements is lacking, no recovery can be had.

Smith v. *Hatcher*, 102 Ga. 158, 29 S. E. 162.

In *Illinois Central R. Co.* v. *Doherty's Admr.*, 153 Ky. 763, 155 S. W. 1119, an action by an administrator for the benefit of brothers and sisters of a deceased, the evidence disclosed that deceased left surviving him several brothers and two sisters, one a Sister of Charity, residing in a convent, who received no support from the decedent in his lifetime, and the other a married woman living in Ireland. There was some testimony that the decedent had borrowed money to send to his sister in Ireland, but whether the money was sent for the payment of a debt or for the support of the husband. No creditor was introduced to show that she resided in Ireland was unable to support herself. There was no evidence that any of the brothers were dependent upon the deceased. The Court held there could be no recovery under the Federal Act.

In this case there was no claim of want or necessity on the part of the sister. She is an intelligent, able bodied woman, of mature years, mentally and physically able to take care of herself. For six years she had done so, working in clerical positions in Chicago. After the death of the mother and brother, the sister returned to work in Chicago where she was working at the time of trial. She was not thrown upon the support of her brother by necessity or misfortune, but in 1917 merely changed her employment. Apparently the deceased brother had assumed full responsibility for the care of the aged and invalid mother, living in her home but keeping it up and supporting her out of his earnings. He needed a housekeeper; the mother needed care. The brother went to Chicago and by promising the sister "more money than she could earn in Chicago", induced her to give up her position in Chicago and take the job of housekeeping for him. Of course natural affection and sympathy for her infirm mother must have influenced her to some extent, but has nothing to do with the question of dependency on her brother. What she did for her brother was compensated for in money. He had never given her any money prior to the time she went back to Iowa to keep house for him and if she had stayed in Chicago he would not have given her anything. The payments were made regularly, twice a month. She was dependent on her brother only in the sense that any employee is dependent upon the employer while the relation continues. Her arrangement with her brother was terminated by his death and was not of a character which constitutes a legal basis for a cause of action under the Federal Employer's Liability Act. The trial judge said that the question was not free from doubt (R., 100), although he

did not feel warranted under the Minnesota practice in setting aside the verdict.

We respectfully submit that this petition be granted and the judgment reversed.

DENEGRE, McDERMOTT & STEARNS,
J. A. CONNELL,
J. C. JAMES,
Attorneys for Petitioners.

BRUCE SCOTT,
Of Counsel.

IN THE

Supreme Court of the United States

October Term, 1925

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,

Petitioner,

vs.

WELLS-DICKEY TRUST COMPANY, as Special Administrator of the Estate of Elmer E. Anderson, Deceased,

Respondent.

To *Messrs. Miner & McDonald,*
Attorneys for Respondent,
Minneapolis, Minnesota.
Messrs. Taatjes & Wilder,
Attorneys for Respondent,
Minneapolis, Minn.

Please take notice that the foregoing petition and supporting brief, together with printed record herein, a copy of which is served herewith, have this day been filed with the Clerk of the Supreme Court of the United States for submission to said Court for its consideration and action on the first motion day following the expiration of two weeks from the date of service of this notice.

Dated April , 1926.

Dunlgie, McDermott & Stearns,
J. A. Connell,
J. C. James,
Attorneys for Petitioner.

Bruce Scott,
Of Counsel.

We acknowledge service of copy of the foregoing petition, brief and notice, together with a copy of the printed record thereon referred to.

Dated, , 1926.

Attorneys for Respondent.

Office Supreme Court, U. S.
FILED
MAR 26 1927
WM. R. STANSBURY
Clerk

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1926.

No. [redacted] 57.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,

Petitioner,

vs.

WELLS DICKEY TRUST COMPANY, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF ELMER E. ANDERSON, DECEASED,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF FOR PETITIONER.

DENEGUE, McDERMOTT & STEARNS,
J. A. CONNELL,
J. C. JAMES,
Counsel for Petitioner.

BRUCE SCOTT,
Of Counsel.

V.

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2. The judgment in this case is on a different cause of action from that which arose at the death of the employee.

3. The sister never had any right to damages in this case.

III. The Supreme Court of Minnesota has construed the Federal Employers' Liability Act in this case as if it contained specific provisions which were proposed in Congress, but rejected.

IV. The intention of Congress is manifest from the fact that it did not adopt the provisions of Lord Campbell's Act and the numerous state statutes which gave the cause of action for death for the benefit of the widow, husband, children, parents and next of kin, without priority.

V. Congress adopted the type of statute classifying beneficiaries, with priorities, which had been in force in many states long prior thereto. The authoritative construction thereof by the state courts is presumed to have been adopted with the statute.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1926.

No. 355

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,

Petitioner,

vs.

ELLIS DICKEY TRUST COMPANY, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF ELMER E. ANDERSON, DECEASED,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

BRIEF FOR PETITIONER

B.

REFER TO REPORTS OF THE OPINIONS DELIVERED IN THE COURT BELOW.

Opinion filed May 29, 1924, reported 159 Minn. 417; 199 N. W. 101. (R. 22-31.)

Opinion filed January 29, 1926, reported 166 Minn. 9, 207 N. W. 186. (R. 106-111.)

Memorandum *per curiam* opinion filed February 19, 1926, reported 166 Minn. 83-4, 207 N. W. 188. (R. 112.)

C

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

1. THE DATE OF THE JUDGMENT OF THE SUPREME COURT OF MINNESOTA TO BE REVIEWED

The opinion of the Supreme Court of Minnesota affirming judgment of the District Court, was filed January 29, 1926 (R. 106), and supplemented by per curiam opinion filed February 19, 1926 (R. 112), although the date of the judgment is February 10, 1926. (R. 110).

2. THE STATUTES CLAIMED TO BE ADVANCED, AND RULINGS MADE IN THE LOWER COURT WHICH ARE RELIED UPON AS A BASIS OF THIS COURT'S JURISDICTION

Respondent's intestate, a railway fireman, was killed in a collision of interstate trains. This suit was brought under the Federal Employers' Liability Act[1] by the administrator of his estate for the benefit of his widow for damages she claimed to have sustained on account of his death.

Section One of the statute provides that in case of death of an employee the carrier shall be liable

> "to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then for the benefit of such parents and next of kin dependent upon such employee, etc."

The specific claims advanced by petitioner in the lower court, which are relied upon as a basis of this court's jurisdiction, are

[1] Act of April 22, 1908, ch. 149, Sec. 1, 35 Stat. 65, as amended by Act of April 5, 1910, ch. 143, Sec. 1, 36 Stat. 291, U. S. Comp. Stat. 8657.

First, that the sister had no interest in the cause of action given by the Federal statute, because the *mother* of deceased survived him; that the cause of action created by the statute accrued *upon the death of the employee* for the *sole benefit of his mother*, for *her* loss; that the sister never had any interest in the cause of action for the employee's death and could not acquire a right of action for any loss she might have sustained by her brother's death, by or through the subsequent death of the *mother*, that rights under the statute must accrue *at the time of the death of the employee*, or not at all.

Second, that the sister had no right of action under the statute because she was not "*dependent*" upon her deceased brother.

The rulings made in the lower court which are relied upon as a basis of this Court's jurisdiction, are as follows:

On motion of petitioner (R. 14, 15) the trial court dismissed the suit (R. 15), holding that the time of the employee's death, his mother was the only person for whose benefit an action could be brought under the Federal Employers' Liability Act, and, that as no such action had been brought for her benefit, a suit under the Federal Act, for his death, could not be maintained after her death, for the benefit of a sister who had had no right under the statute at the time of his death. (R. 18.)

From a judgment dismissing the case (R. 14,) the administrator appealed to the Supreme Court of Minnesota, which court, in an opinion filed May 29, 1924, reversed the judgment and held that the administrator might recover for the benefit of a dependent sister, regardless of the survival and subsequent death of the

mother. (R. 22-30, 159 Minn. 419, 199 N. W. 101.) Justice Quinn dissented.

On transcript of this judgment of reversal by the Supreme Court of Minnesota (R. 30) the case was again tried in the District Court of Hennepin County. (R. *et seq.*)

At the opening and close of the evidence in the second trial, petitioner moved for dismissal and directed verdict in its favor, on the ground that under the complaint and admitted facts plaintiff had failed to establish a cause of action, because it appeared that deceased left a mother, a member of the second class of beneficiaries under the Federal Act; that the parties were engaged in interstate commerce and were governed by the Federal Act; that deceased left no widow, father or children; that the mother survived him and the [illegible] action vested in her, and that when she died on May 1921, the cause of action died with her; and on the further ground that plaintiff failed to show any [illegible] within the purview of the Federal Act. (R. 43, 77.) Said motions were denied by the court and petitioner excepted. (R. 44, 77.)

The case was submitted to a jury and their [illegible] verdict for plaintiff.

Petitioner moved to set aside the verdict of the jury and enter judgment in favor of defendant notwithstanding the verdict, because the verdict was not supported by the evidence, was contrary to law and because the court should have granted defendant's motion for a directed verdict in its favor made at the close of all the evidence. (R. 80-81.) The court denied said motion (R. 81), and entered judgment on the verdict, amounting, including interest and costs, to $[illegible]. (R. 82.)

From this judgment petitioner appealed to the Supreme Court of Minnesota, assigning error on both points (R. 104, 77 and 89-90). The court affirmed the judgment in an opinion filed January 29, 1926 (R. 106, 166 Minn. 79, 207 N. W. 186), holding that the evidence of dependency was sufficient under the Federal Act and referring to its former opinion as disposing of the question whether the suit might be maintained for the benefit of the sister. On rehearing, the Supreme Court of Minnesota filed a *per curiam* opinion February 19, 1926, as follows:

> "One ground of the defendant's motion for a directed verdict was that the sister of the decedent was not a beneficiary under the statute, his mother living at his death, but dying before action brought, and that the action could not be maintained; and error is assigned in the denial of such motion and the motion for judgment notwithstanding the verdict.
>
> "The question was considered on the former appeal and is again pressed by the defendant. We hold that the sister was a beneficiary within the federal act, and that there could be a recovery if she was in fact a dependent. So far as we are advised, but one case, *Kerner* v. *Trans Mississippi Terminal R. Co.*, 158 La. 853, 104 So. 740, involving a similar statute, has arisen since. The conclusion there reached is not in harmony with that adopted by us.
>
> "The contention of the defendant has been considered again on this appeal, we adhere to the decision made on the former one, and the judgment is affirmed." (R. 112, 166 Minn. 83-4, 207 N. W. 188).

Thereupon petitioner made due application to this Court for a writ of certiorari to the Supreme Court of Minnesota, which was allowed by this Court June 1, 1926, 271 U. S. 657.

3. STATUTORY PROVISION UNDER WHICH THIS COURT JURISDICTION IS INVOKED.

Sec. 237 (b) of the Judicial Code, as amended February 13, 1925, (c. 229, Sec. 1, 43 Stat. 937; Sec. 344, 9, Title 28, "United States Code," Act of June 26 1926).

4. CASES BELIEVED TO SUSTAIN THE JURISDICTION OF THIS COURT.

Reading Company v. *John L. Koons*, in which the Court granted writ of certiorari to the Supreme Court of Pennsylvania, January 5, 1925 (266 U. S. 600). Decision of this Court reversing the Supreme Court of Pennsylvania on construction of Federal Employers' Liability Act, filed April 12, 1926. (271 U. S. 58).

Minneapolis, St. P. & S. S. M. R. Co. v. *Ernest J. Gotschall*, writ of certiorari to the Supreme Court of the State of Minnesota granted June 9, 1924 (265 U. S. 579). Decision of this Court, affirming judgment of the Supreme Court of Minnesota construing the Federal Employers' Liability Act and the Safety Appliance Act, filed January 4, 1926. (270 U. S. 436).

D.

Statement of the Case.

Elmer E. Anderson, a fireman on petitioner's interstate train, was instantly killed in a collision at Stanton, Iowa, November 1, 1920. (R. 23-9, R. 112.)

Deceased left no widow, child or father, but was survived by his mother, his brother and his sister. (R. 23, 38.)

It is undisputed that on the death of Anderson a cause of action accrued under the Federal Employers' Liability Act, *for the sole benefit of his surviving mother*; that the brother and sister were excluded by the controlling language of the statute.

March 14, 1921, four months after Anderson had been killed, the District Court of Union County, Iowa, where he had lived, where his death occurred, and where his mother and sister resided, appointed the sister administratrix of his estate. (R. 10.) However, no suit was brought by the administratrix, or anyone else, to enforce the cause of action which had accrued for the mother. (R. 34.)

May 5, 1921, six months after Anderson's death, *his mother died*. (R. 10.) Up to the time of her death no action had been brought on the cause of action created by the Federal statute for her benefit. (R. 29, 34.)

December 27, 1921, about fourteen months after Anderson's death and more than seven months after the death of his mother, the Wells Dickey Trust Company of Minneapolis, Minnesota, respondent herein, was appointed by a Minnesota court as "special administrator" of the estate of Elmer E. Anderson, the de-

counsel in man (R. 18.) and as such "special adm
trator" brought this suit in the District Court of He
pin County, Minnesota, under the Federal Emplo
Liability Act, for damages for the death of said A
son, *for the benefit of his sister* (R. 6-10.)

The trial court dismissed the suit (R. 15) on
ground that the mother was the only person for w
benefit an action accrued on the death of Anderso
that this suit could not be maintained, after he d
for the benefit of the sister (R. 18.)

The administrator appealed to the Supreme Cou
Minnesota where the judgment of the trial court w
revised (R. 22 to 30, 139 Minn. 417, 166 N. W. 501.)

The court admitted that its decision was contra
numerous decisions of authority. Justice Q
stated, stating that in his opinion, a surviving dep
relative must acquire rights under the Federal
at the time of the death of the employee, or not
(R. 29, 139 Minn. 423, 166 N. W. 503.)

On transcript of this judgment of reversal to t
preme Court (R. 30) the case was again tr
District Court of Hennepin County (R. 32-37
dence was offered to show that the sister, an ele
woman, about three years of age (R. 44) and
considerable business experience, had supported h
clerical positions in the City of Chicago from
1917, earning twenty-eight dollars ($28.00) per
week (R. 70-76), that in 1917 the mother was
health and in need of care and the brother Em
Anderson, respondent's intestate, had gone to C
and persuaded the sister to return home to take
of her mother and their home, by promising to pa
more money than she could earn in Chicago (R.

The sister testified that pursuant to this agreement she returned to the family home in Iowa, cared for her mother and ran the household, the brother furnishing the money, and that he also paid her fifteen or twenty dollars per week (R. 55,) paid semi-monthly (R. 56,) as compensation for the services rendered her mother and him. (R. 61.) It was conceded that if she had continued working in Chicago he would not have paid her anything. (R. 62.) After the deaths of the mother and brother the sister returned to work in Chicago, where she was employed at the time of the trial. (R. 69.)

Petitioner contended that this bargain made between the brother and sister, for her return home to keep house and care for her aged mother, was no more than a contract, such as might have been made with or by any competent housekeeper, and which his death terminated; that as the sister was an intelligent, able-bodied woman, well able to take care of herself, she was not "*dependent*" upon her brother, within the meaning of the Federal Employers' Liability Act. (R. 77.)

The trial court overruled this contention of petitioner and the motions raising the point (R. 91,) although stating that the question "was not free from doubt." (R. 90.) Throughout the second trial petitioner again objected, by apt motions and exceptions (R. 44, 77, 89-90,) to the maintenance of the suit for the benefit of the sister, because the right of action had vested in Anderson's mother at his death and was not transferred to the sister. Under the decision of the Supreme Court of Minnesota the trial court overruled all such objections and motions of petitioner. (R. 44, 91.) The case was submitted to a jury; there was a verdict for plaintiff and a judgment thereon, amounting, including interest and

costs, to five thousand and eight dollars and ninety-eight cents ($5,008.98). (R. 102.)

From this judgment petitioner appealed to the Supreme Court of Minnesota, assigning error on two points. (R. 104, 77 and 80-90.) The court affirmed the judgment in an opinion filed January 28, 1926. (R. 108; 166 Minn. 79, 207 N. W. 186.) holding that the evidence of dependency was sufficient under the Federal Act and referring to its former opinion as disposing of the question whether the suit might be maintained for the benefit of the sister. On rehearing, the Supreme Court of Minnesota filed a *per curiam* opinion February 19, 1926 (R. 112; 166 Minn. 83-4, 207 N. W. 188) stating that the last mentioned point had been reconsidered but that the court adhered to its former decision that the suit might be maintained for the benefit of the sister, notwithstanding the survival and subsequent death of the mother who had been the sole beneficiary, and the court affirmed the judgment. (R. 112.)

Thereupon petitioner made due application to this Court for a writ of certiorari to the Supreme Court of Minnesota, which was allowed by this Court June 1, 1926, 271 U. S. 657.

It will be observed that we are not concerned with the question whether the right of action which accrued to the mother on the death of Anderson was one which survived to her administrator or heirs, so that they might recover, in an appropriate action, for the pecuniary loss she sustained. No claim is made for the damage sustained by the mother. No claim is made that mother's cause of action was inherited by the sister under any state law of descent.

The question is whether the sister, who admittedly

had no interest in the cause of action when it accrued on the death of the brother, acquired, by reason of the death of her *mother*, a right of action, under the Federal Statute, for damages the sister claimed to have sustained by the death of her *brother*.

E.

Specification of Assigned Errors Intended to Be Urged

1. The Supreme Court of Minnesota erred in holding that this suit might be maintained for the benefit of the sister notwithstanding the fact that the mother of the deceased employee survived him and admittedly was sole beneficiary under the Federal Statute at the time the cause of action accrued.

2. The Supreme Court of Minnesota erred in holding that the evidence, showing a mere contract of employment between plaintiff's intestate and his sister, was sufficient proof of dependency under the Federal Employers' Liability Act.

F

ARGUMENT

I

UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT, ANDERSON'S MOTHER WAS THE ONLY PERSON FOR WHOM A CAUSE OF ACTION ACCRUED AT THE TIME OF HIS DEATH. THE SUIT WAS PROPERLY BROUGHT.

The statute provides:

> "Every common carrier by railroad while engaged in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee." (Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65; Sec. 51, c. 2, Title 45, "United States Code," Act of June 30, 1926.)

Anderson left no widow, child or father. His mother, the surviving parent, was the sole beneficiary under the statute. His brother and sister were excluded. It is conceded by respondent, and the Supreme Court of Minnesota, that the sister for whom judgment has been given in this case, had no right to or interest in the cause of action for Anderson's death *at the time his death occurred and the cause of action accrued.*

In *St. Louis, San Francisco & Texas Railway Co. v. Seale*, 229 U. S. 156, the suit was brought by the widow and parents of an interstate employee and the

petition stated a case under the state law, which gave the right of action to the surviving husband, wife, children and parents. This Court said, page 162:

> "Two of the plaintiffs, the father and mother in whose favor there was a separate recovery, are not even beneficiaries under the Federal statute, there being a surviving widow."

In *Taylor v. Taylor*, 232 U. S. 363, the widow of a railroad employee killed in interstate commerce accepted a judgment in compromise of suit brought by her as administratrix. Thereafter the father of the deceased employee filed claim for one half the net proceeds of the judgment, under the distribution law of the state. This Court held the right of the widow under the Federal Employers' Liability Act was for herself alone and that the father was excluded.

In *New Orleans & Northeastern Railroad Company et al. v. Harris, Administratrix*, 247 U. S. 367, the Court held that under the Federal Employers' Liability Act, no cause of action accrued for the benefit of a dependent mother, where the deceased employee left a widow, who, although she lived apart from him at the time of his death, was never remarried or divorced. The facts were that, after living with his wife for six months, the deceased fell ill and his wife left him; thereafter her whereabouts were unknown to him; she was alive and there was no proof of divorce. After separation from his wife, deceased had provided a home for his mother, had supported her and he was her sole dependence. In delivering the opinion, Mr. Justice McReynolds said, p. 372:

> "The act makes the widow sole beneficiary when there is no child and only in the absence of both may parents be considered. The deceased left a widow and although they had lived apart no claim is made that rights and liabilities consequent upon marriage

had disappeared under local law. Of course, we do not go beyond the particular facts here disclosed. In the circumstances, proof of the mother's pecuniary loss could not support a recovery."

It is well settled that the action given by the statute is not for the benefit of the estate of the deceased employee. *Louisville & Nashville Railroad Company v. Stewart*, 241 U. S. 261.

II.

A NEW CAUSE OF ACTION IN FAVOR OF THE SISTER COULD NOT ARISE BY THE DEATH OF THE MOTHER. RIGHTS OF BENEFICIARIES MUST ACCRUE AT THE TIME OF THE DEATH OF THE EMPLOYEE, OR NOT AT ALL.

Anderson was killed November 1, 1920; his mother died May 14, 1921; during her lifetime no suit was brought on the cause of action for her benefit. December 27, 1921, respondent was appointed "special administrator" of the estate of Anderson, the deceased employee, and brought this suit, not for the benefit of the mother, but for the benefit of the estate of the mother on account of damages sustained by her prior to her death, and not on the cause of action which had accrued when Anderson was killed, but on another cause of action, for the benefit of the sister, to recover for the loss *she* claimed to have sustained by her brother's death.

1.

THE CAUSE OF ACTION ACCRUED AT THE TIME OF THE EMPLOYEE'S DEATH.

In *Readout Company* v. *Keene, Admr.*, 271 U. S. 58 (April 13, 1926, after decision of this case by the Supreme Court of Minnesota), this Court held that the cause of action for death under the Federal Employers' Liability Act *accrues at the time of the death of the employee.*

2

THE JUDGMENT IN THIS CASE IS ON A DIFFERENT CAUSE OF ACTION FROM THAT WHICH AROSE AT THE DEATH OF THE EMPLOYEE.

The Damages Are Different

In *Chesapeake & Ohio Railway Company* v. *Dixon*, 179 U. S. 131, in defining the term "cause of action" in a suit under the Kentucky statute on death by wrongful act, this Court said, page 139:

> "This cause of action manifestly comprised every fact which plaintiff was obliged to prove in order to obtain judgment, or, conversely, every fact which defendants would have the right to traverse."

This definition was repeated with approval in *Bradford* v. *Southern Railway Company*, 195 U. S. 243, 249. In Vol. 2, Words & Phrases, First Series, page 1015, it is stated that:

> "The elements of a cause of action are: First, the breach of duty owing by one person to another; second, the damage resulting to the other from the breach."

In *Michigan Central Railroad Company* v. *Vreeland*, 227 U. S. 59, at page 68, Justice Lurton said:

> "The obvious purpose of Congress was to save a right of action to certain relatives dependent upon an employee wrongfully injured, for the loss and damage resulting to them *financially* by reason of the wrongful death. * * * *It is therefore a liability for the pecuniary damage resulting to those who sue for that only.*" (Italics ours.)

In the same opinion, at page 72, Justice Lurton said:

> "The rule for the measurement of damages would *differ according to the relation between the* parties, plaintiff and the decedent, 'according as the action is brought for the benefit of husband, wife, minor

child or parent of minor child, for the loss of services or support to which the beneficiary was legally entitled, or is brought for the benefit of a person whose damages consist only in the loss of a prospective benefit to which he was not legally entitled.' Tiffany, Death by Wrongful Act, Secs. 158, 160, 162." (Italics ours.)

In *Taylor* v. *Taylor*, 233 U. S. 363, at 370, the Court said:

"If under Section 1, the cause of action was not derived from the deceased in the sense of a succession from him as said in one of the cited cases, her cause of action was 'one beyond that which the decedent had—one proceeding upon altogether different principles.' It came to her, it is true, on account of his death, but because of her pecuniary interest in his life and the damage she suffered by his death. It was her loss, not that which his father may have suffered. The judgment she recovered was for herself alone. He had no interest in it. Any loss he may have suffered was not and could not have been any part of it, as we have seen.

The Parties in Interest Are Different.

In *Chicago, Rock Island & Pacific Railway Company* v. *Schendel*, 270 U. S. 611, (April 12, 1926, after the decision of the Supreme Court of Minnesota in this case) this Court, reversing the Supreme Court of Minnesota, held that a suit by an *administrator* for the benefit of a widow, under the Federal Employers' Liability Act, was barred by judgment in another action against the *widow*, because the right to be enforced by the administrator under the Federal Act was *the right of the widow and she was the real party in interest.*

The same day, in *Reading Company* v. *Koons*, *supra*, this Court said that the administrator acts only for the benefit of the persons specifically designated in the stat-

In *Stewart v. Baltimore & Ohio Railroad Company*, 168 U. S. 445, the Court held that under the Act of February 17, 1885 (c. 126, 23 Stat. 307), giving a right of action for death by wrongful act in the District of Columbia, the personal representative, having no pecuniary interest in the recovery, was merely a nominal plaintiff.

Atlanta, Knoxville and Northern Railway Company v. Hooper, 92 Fed. 820, was a suit brought by Hooper, administrator of the estate of J. W. Lebow, for the benefit of Mariah Lebow, mother of the deceased. More than one year after the declaration was filed the plaintiff was granted leave to amend so as to state that the suit was brought for the benefit of James Madison Lebow, the father of deceased. The defendant filed a plea setting up the one year statute of limitations. The trial court held that suit was begun by the issuance of summons and that the amendment did not change the parties or nature of the action then brought. From a judgment for plaintiff the defendant appealed. The Circuit Court of Appeals, Sixth Circuit, Judges Taft, Lurton and Severens, held that the amendment changing the beneficiary was subject to the plea of limitations because a suit in behalf of one beneficiary is a different suit from one in behalf of another. The Tennessee statute gave the cause of action for the benefit, first, of the father, and after him to the mother. In delivering the opinion, Judge Taft said, p. 822:

> "The next of kin for whose benefit the suit is brought are the real plaintiffs, and the administrator, through *demurrer lies*, and a necessary party in all cases where there is no widow or child of the deceased, is, nevertheless, but a nominal party, and a mere trustee. *Wells v. Railway Co.*, 88 Tenn. 128, 12 S. W. 428; *Lawrence v. Railroad Co.*, 91 Tenn. 458, 19 S. W. 430; *Railroad Co. v. Rose*, 94 Tenn. 386, 29 S. W. 370. Under sec-

tion 3134, the recovery is not only for the mental and physical suffering of the deceased, his loss of time, and necessary expenses incident to the injury, but it is also for the direct pecuniary injury to the beneficiary on whose behalf the suit is brought, caused by the death complained of. The case of action may, therefore, vary materially in the extent of the recovery, as it is brought for one or another beneficiary. The administrator, except where there is a widow or child, must bring the suit; *but his suit for one beneficiary is a different suit from a suit by him for another. To change the beneficiary, under the statute, changes the suit, the amount of recovery, and states a new and different cause of action.* In the light of this conclusion, the plea of the statute was good against the amendment herein when filed, and should have been sustained." (Italics ours.)

The Federal Statute gave a single cause of action for the death of Anderson. It accrued at the time of his death. His mother was the sole beneficiary. She was the real party in interest and the right, under the statute, to be compensated in damages was *her* right to be compensated for *her* loss.

The judgment in this case is upon a supposed cause of action, which, if it existed, would be entirely different from the cause of action which accrued at the time of Anderson's death; the sister is the real party in interest in this suit and the judgment is for the loss *she* claims to have sustained by reason of her brother's death.

3.

THE SISTER NEVER HAD ANY RIGHT TO DAMAGES IN THIS CASE.

The sister had no interest in the cause of action at the time it accrued. She had no interest in it during the life of her mother. Surely the death of the mother could

not give the sister rights not conferred by the Federal Statute at the time the cause of action accrued. It is not the death of the *mother* which gives a cause of action under the statute; it is the death of the *employee*.

The language of the statute is plain and unambiguous. The Court below has disregarded the controlling words "if none." The cause of action which arose on Anderson's death was not derived from him in the sense of succession; it was a cause of action beyond any which he had. It came to his mother at his death, and on account of his death, but solely because of her pecuniary interest in his life and the damage *she* suffered by his death. It was *her* loss, not that which the sister may have sustained. The absolute vesting of the right in some beneficiary at the time of the death of the employee is apparent from the fact that the damages vary according to the relationship of the beneficiary to the employee and the dependency of the beneficiary. The statute is such that a right of action for the benefit of the sister would have accrued only if there had been no surviving mother. The immediate, final and absolute vesting of the right occurs at the time of the death of the employee; the beneficiaries have a right then or not at all. The statute provides for several possible claimants, but the facts in each case determine which of them is the actual and sole claimant. In this case the right belonged to the mother exclusively and could not be transferred to any other beneficiary either by her death or failure to bring suit. There is no life interest in the mother with remainder over to the sister. One action is granted, not several. When Anderson died his sister had no cause of action and the death of the mother gave her none.

In *Reading Company* v. *Koons, Admr.*, *supra*, this

Court held that the two-year limitation in this statute runs from the date of the death of the employee. What becomes of this limitation if a right of action for a different party in interest and with a different measure of damages, arises on the death of the first beneficiary long after the death of the employee? The limitation, running from the death of the employee, precludes the possibility that the statute creates new causes of action for successive beneficiaries in turn.

Apparently no case exactly like this has arisen under the Federal Employers' Liability Act, but there are a number of authoritative and well reasoned decisions in similar cases under like provisions of state statutes.

A leading case is *Woodward* v. *The Chicago and North Western Railway Company*, 23 Wis. 400. That suit was by an administrator to recover damages, under the Wisconsin statute, for the death of Julia B. Woodward. The Wisconsin statute provided that the amount recovered by an administrator in an action for death by wrongful act "shall belong and be paid over to the husband or widow of such deceased person, if such relative survive him or her; but if no husband or widow survive the deceased, the amount recovered shall be paid over to his or her lineal descendants, and to his or her lineal ancestors in default of such descendants." Thus the beneficiaries under the Wisconsin law were classified as in the Federal Employers' Liability Act, the only difference being that, in Wisconsin, the first right was in the husband or widow; it none, in the lineal descendants, and, if none, in the lineal ancestors. Under the Wisconsin statute, as under the Federal Act, damages are measured by the pecuniary loss of the beneficiary for whom suit is brought.

The complaint alleged that the deceased was survived

by her husband and child. While the suit was pending the husband died and the administrator sought to continue the action for the benefit of the child. The court held that upon the death of the wife the right of action, by statute, vested solely and exclusively for the benefit of her husband; that he alone was entitled to the amount recovered; that the lineal descendants of deceased had no interest whatever in the action, and that after the death of the husband the action could not be prosecuted for the benefit of the infant child. The court said, p. 403:

"With respect to the persons to be benefited by the money recovered in an action of this nature, the statute of this state differs materially from that of New York, and from the English statute, 27 and 28th Victoria, chapter 93. The New York statute provides, that 'the amount recovered shall be for the exclusive benefit of the widow and next of kin, and shall be distributed in the proportions provided by law in relation to the distribution of personal property left by an intestate.' The English statute declares, 'that every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused.' The statute of this state reads as follows: 'And the amount recovered shall belong and be paid over to the husband or widow of such deceased person, if such relative survive him or her; but if no husband or widow survive the deceased, the amount recovered shall be paid over to his or her lineal descendants, and to his or her lineal ancestors in default of such descendants; and in every action the jury may give such damages, not exceeding five thousand dollars, as they shall deem fair and just in reference to the pecuniary injury resulting from such death to the relations of the deceased specified in this section.' By all the statutes, the action must be brought in the name of the personal representative of the deceased—that is, the executor or administrator. Now, while it is apparent, under the English and New York statutes, that the right of action vests at once for the benefit of each and all of the persons

entitled to receive any part of the money recovered, and may be maintained so long as any one of such persons survives, it is equally apparent by our statute, that it vests only for the benefit of the husband or widow, in case the deceased leaves such surviving relative; and if no such relative survives at the time of the death, the action may be prosecuted for the benefit of the lineal descendants of the deceased; and in default of these, then for the benefit of his or her lineal ancestors. * * *

"In this case, the deceased, who was a married woman, left a husband who survived until some time after this action was commenced. Upon her death, therefore, the right of action, by the statute, vested solely and exclusively for the benefit of her husband. He alone was entitled to the amount to be recovered, and could hold and dispose of the same at pleasure. The lineal descendants and ancestors of the deceased had no interest whatever in the action, and the damages to be recovered could not be estimated with reference to the pecuniary injury, if any, resulting to them, or any of them. The damages must have been given in reference to the pecuniary injury and loss of the husband alone; and such is the obvious interpretation of the words in the last clause 'with reference to the injury resulting from such death to the relatives of the deceased specified in this section' which are to be understood distributively, and not collectively, as counsel seem to suppose. * * *

"The position that the action does not abate because the nominal plaintiff, the administrator, still lives and is ready and willing to prosecute it, seems scarcely worthy of serious thought. The administrator is a mere trustee, so made by the statute, with power to sue for the benefit of his *cestui que trust*, or the person beneficially interested. He has no right except in virtue of the right of the real party in interest, and if the right of that party is lapsed or lost, so that no recovery can be had upon it, it follows that the action can be no longer maintained. As already observed, whether there is a person in being entitled, under the statute, to the money recovered, and whom the administrator represents, is one of the facts in issue, which must be proved be-

> fore any recovery can be had. It appears that the person so entitled died, and that the right of action expired with him; and for that reason, if for no other, the judgment of nonsuit must be affirmed."

Another leading case is *Bean* v. *Louisville & Nashville Railroad Company*, 94 Tenn. 388, 29 S. W. 370, an action by an administrator to recover damages for the death of Frank Murray, plaintiff's intestate, for the benefit of Mary Ann Murray, the surviving widow. The Tennessee statute at that time provided that the right of action for death by wrongful act

> "shall pass to his widow, and in case there is no widow, to his children, or to his personal representative, for the benefit of his widow or next of kin."

After trial of the case and appeal to the Supreme Court of Tennessee, the widow, for whose benefit the suit was brought, died. Defendant moved to abate the suit on account of the death of the widow. The plaintiff administrator sought to continue the suit for the benefit of Reganie Murray, father of deceased Frank Murray, and his surviving next of kin. The Supreme Court of Tennessee said, 29 S. W. 371:

> "The question now presented, probably for the first time in this state, is whether, upon the death of the widow, the suit abates, or can the administrator still prosecute it for the benefit of the father, who is the next of kin of plaintiff's intestate? The question, when laid in a narrow compass and reduced to its ultimate analysis, is, whether the right of action survives and is limited to those entitled to the recovery at the death of the deceased, or whether, upon the death of those then entitled, the cause of action survives and reverts to the next of kin in the line of distribution. * * * The widow having died, the question now to be determined is, whether the suit abates, or whether the administrator may still prosecute it for benefit of the father of deceased, who is the next of kin now surviving."

At page 372 the court said:

"We think the exclusive statutory beneficiary was that person or class of persons who were entitled to the recovery *at the death of deceased, when the cause of action accrued.* In this case it was the widow, and, in the language of the statute, the right of action passed to her, or to the administrator, for her benefit. The right of recovery having once vested in the widow, it did not pass upon her death to her personal representative, neither did it revest in the next of kin of deceased, for the reason that no provision is made in the statute for such contingency. The cause of action, upon the death of the person to whom it survived, or for whose benefit it might be prosecuted, was thereby extinguished."

In closing the opinion the court said (page 372):

"Had there been no widow and children at the death of the intestate, the right of action would have passed to the father, or rather to the personal representative, for the benefit of the father, or in the event the deceased left no father surviving him, the suit would be prosecuted for the benefit of the next of kin living at the death of deceased. The right of action, however, does not pass to any person, or survive to any beneficiary, excepting those *appointed in the statute as entitled to the recovery when the cause of action accrued.*" (Italics ours.)

Another important case is *Sanders' Adm'x. v. Louisville and Nashville Railroad Company*, 111 Fed. 708, a ision of the Circuit Court of Appeals, Sixth Cir- t, delivered by Judge Lurton, with whom sat Judges y and Severens. The suit was brought by Kate G. nders, administratrix of the estate of Martin J. Sand , deceased, under the same statute of Tennessee which involved in the case of *Bean v. Louisville and Nash- Railway Company*, last above referred to. The laration averred that at the time of his death Sanders unmarried and without issue, but left surviving him father, his mother, one brother and four sisters. ge Lurton said that, under this state of facts, the ac-

tion could only be brought by the personal representative of the deceased for the use and benefit of the father of the deceased who, under the Tennessee statute of distribution, was the next of kin entitled to the sole benefit of recovery.

While the suit was pending the father died. Thereupon the plaintiff filed an amended declaration averring that prior to his death and before the suit had been brought, the father had sold and transferred his right to the recovery in the case to the plaintiff, in trust for her mother, her brother and sisters. The defendant pleaded in abatement that, as the father alone was entitled to recover damages for the death of plaintiff's intestate, the death of the father extinguished the right of action. The District Court adjudged defendant's plea in abatement good and dismissed the suit. This action of the court was sustained by the Circuit Court of Appeals, which held that the cause of action abated with the death of the beneficiary. In delivering the opinion of the court Judge Lurton said, page 709:

> "The next of kin for whose benefit the right of action survives are the real plaintiffs, and the administrator, though made a necessary party plaintiff by the statute, is nevertheless a mere trustee and a nominal party. *Webb v. Railway Co.*, 88 Tenn. 119, 128, 12 S. W. 428; *Lampe v. Railroad Co.*, and *Railway Co. v. Lilly*, cited above. *Railway Co. v. Hooper*, 25 C. C. A. 24, 26, 92 Fed. 820. . . . *Inasmuch as the right of action survives only for the benefit of the beneficiaries designated in the statute, it is essential that the plaintiff's declaration show that the suit is brought for the use and benefit of a statutory beneficiary in existence when the right of action accrued.*" (Italics ours.)

At page 710 Judge Lurton said:

> "In *Railway Co. v. Hooper*, 25 C. C. A. 24, 92 Fed. 820, we held that, inasmuch as the pecuniary damages recoverable for the loss sustained by the

next of kin for whose benefit the action survives would depend much upon the nearness and dependence of the beneficiary, a suit brought by an administrator for the benefit of one averred to be the next of kin entitled to the recovery was a different cause of action from that stated in an amendment substituting a different beneficiary as the person for whose use the action was brought, and that a plea of the statute of limitations was good against the new action, which would not be good against the action as originally brought."

A case strikingly in point with the one at bar, is *Hammatt Adm'x. v. Lewiston, Augusta & Waterville Street Railway*, 106 Maine 209, 76 Atl. 672, a suit for wrongful death under the statute of Maine, the controlling provisions of which, as quoted by the Supreme Court, p. 673, are as follows:

> "Sec. 10. Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of his widow, if no children, and of the children, if no widow, and if both, then of her and them equally, and if neither, of his heirs. • • •"

Plaintiff's intestate, Harold Martin, killed in a crossing accident, was survived by his widow and sister. The widow died before the suit was brought, and recovery was sought for the benefit of the sister, as sole heir at law of Harold Martin. The only question before the court was whether the action could be maintained for the benefit of the sister.

The court said, p. 673:

> "In other words, the plaintiff's position is that the administrator is given a right of action in any event, and the beneficiaries should be determined, not as of the date of the death, but of the recovery. Such a construction cannot be adopted. • • •
>
> "The language of the statute under consideration is plain and unambiguous. Some beneficiary named therein must exist at the time of the death of the de-

ceased, otherwise no right of action arises. The suit is not for the benefit of the estate, and creditors have no interest in it. True, such suit is brought in the name of the administrator, but he is merely the nominal party and acts as trustee. The Legislature could have given the right directly to the widow or children or heirs, had it seen fit to do so, as the Legislatures of some states have done. But if none of the beneficiaries exists at the time of death, no right of action is created. *In re Ives, R. R. Co. v. Tilly*, 90 Tenn. 563, 18 S. W. 243; *Cooper v. State Electric Co.*, 63 N. J. Law, 558, 44 Atl. 633; *Ferguson v. St. Lawrence*, 86 Wis. 526, 57 N. W. 265.

"Under section 10, the party for whose benefit the action is brought depends upon the nature of the family that is left and four different conditions are provided for. * * * But in any event the immediate, absolute, and final vesting of the right occurs at the time of the decease, not at the time of bringing suit or of recovery. The beneficiaries have a right of action then or not at all and the facts of each particular case determine which beneficiaries have the right. If there is a widow as here, she has the sole and exclusive right. It belonged to her immediately upon the death of her husband and could not be transferred to any other beneficiary either by her death or failure to bring suit. The statute provides for several possible claimants, but the facts in each case determine which of them is the actual and sole claimant. There is no life interest in the widow with a remainder over to the heirs at law. One action is granted, not several. When the husband died the sister had no cause of action, and the death of the widow has not given her one. * * *

"Again the cause of action accrues at death by the very terms of the statute. The last clause of section 10 makes the two year limitation within which suit can be brought, begin at that time. Whoever has a cause of action under this statute has two years within which to bring it. Can it be that if a widow is left who survives her husband one year and eleven months, the heirs would then have a right of action but only one month in which to enforce it? The absolute vesting of the right in some beneficiary at time of death is further appar-

out from the fact that the damages vary according to the relationship of the deceased to the beneficiary and the dependence of the latter upon the former. 'The injury for which damages can be recovered must be wholly to the beneficiaries themselves, and it is limited to the pecuniary effect of the death upon them.' *McKee* v. *Dredging Co.* 92 Me. 454, 43 Atl. 29. The pecuniary effect of the death of a husband upon his widow, and therefore the damages recoverable in an action for her benefit would differ materially from the pecuniary effect of his death upon remote heirs at law, and from the damages recoverable by them."

Dilley v. *Cleveland, Cincinnati, Chicago & St. Louis Railway Company*, 34 Ind. App. 52, 72 N. E. 271, was a suit by an administrator under the Indiana statute to recover damages for the death of plaintiff's intestate, who left surviving a widow and three brothers. The widow died while the suit was pending and attempt was made to carry it on for the benefit of the brothers.

The court said, 72 N. E. 273:

"The action must be brought, and must be maintained to the end, by the personal representative of the person for whose wrongful death the damages are sought. He pursues the remedy, not for the benefit of his decedent's estate, but as a convenient trustee specially designated by the statute to recover and distribute the damages for the beneficiaries recognized as such by the statute. Of those there are two classes. First, the widow and children, if there be such persons; and, second, other persons who are next of kin to the person for whose wrongful death the action is maintained. If there be persons entitled to damages of this first class, the damages would be awarded for the exclusive benefit of such persons. Persons of the second class would not be entitled to damages, and there could be no recovery for their benefit, if there were persons entitled of the first class. The right of action accrues upon the death of the intestate. The widow of the appellant's intestate survived him, and there being no children, the right of action existed for her benefit alone, and

there never was any right of action for the benefit of the brothers or 'next of kin' of the intestate."

Since the first decision of the Supreme Court of Minnesota in this case the Supreme Court of Louisiana has construed a statute of that state, in the case of *Kerner et al. v. Trans-Mississippi Terminal Railway Company*, 158 La. 868, 104 So. 740, referred to in the *per curiam* opinion of the Minnesota Court. (R. 112.) The suit was for damages for the death of plaintiff's brother, who was survived by his mother and the plaintiffs in the suit, a brother and five sisters. Under the Louisiana code the mother alone had a prior right of action for damages for his death. She brought suit but died before it was tried. Thereafter the brother and sisters brought suit. The Supreme Court of Louisiana held that such a right of action abated by the death of a person having the first right; that the statute declared that the right of action accrued to brothers and sisters only in cases where there was no surviving spouse or child or parent; that the right of action belonged to the preferred survivors only, to the exclusion of any and all other survivors, and that if one of the survivors, who had thus acquired the right of action, died afterwards, his death did not confer the right of action upon any other survivor; that the right of action was not transmissible from one survivor to another.

The Louisiana court pointed out the difference between statutes like Lord Campbell's Act, giving beneficiaries a joint right of recovery, and statutes where beneficiaries are placed in different classes, one class not being entitled to recover if there are members of a preceding class.

In *Betz v. Kansas City Southern Railway Company*, Mo. , 284 S. W. 455 an opinion filed May 24,

1926, an action was brought by the administrator of the estate of Jenny Baker, deceased, to recover damages for her death in an automobile crossing accident. She was instantly killed while Charles H. Baker, her husband, was so injured in the same accident that he died three hours later. The pertinent part of the Missouri statute on death by wrongful act (Sec. 4217 R. S. Mo. 1919) is as follows:

> "*Fourth*, if there be *no husband*, wife, minor child or minor children, natural born or adopted as *herein otherwise* indicated, or if the deceased be an unmarried minor and there be no father or mother, *then in each case* suit may be instituted and recovery had by the *administrator or executor of the deceased* and the amount recovered shall be distributed according to the laws of descent."

The Supreme Court of Missouri pointed out that plaintiff sought to bring himself within the fourth subdivision of the statute, claiming the right to suit as administrator on the ground that there was no surviving husband, child or children of Jenny Baker. The court said that it was thoroughly established law in Missouri that a party seeking recovery for death by wrongful act must bring himself squarely within the terms of the statute; that plaintiff contended that because the husband was at no time after the death of his wife capable of commencing or authorizing the commencement of a suit for his wife's death, both husband and wife really perished in the same disaster. The court quoted from *Beauvais v. L. & N. R. Co.*, 94 Tenn. 388, 29 S. W. 579, *Hammond v. Lewiston A. & W. St. Ry.*, 106 Maine 209, 76 Atl. 672, and *Woodward v. C. & N. W. Ry. Co.*, 23 Wis. 400, and held that the administrator had no cause of action, same having terminated with the death of the husband.

In *Frazier v. Georgia Railroad & Bank. Company*, 96 Ga. 78, 22 S. E. 930, decided in 1895, the Supreme Court

of Georgia, under a statute providing that "a mother, or if no mother, a father, may recover for the homicide of a child," held that where the mother was living at the time of the death of the minor child, but she died prior to bringing an action, the father of the child could not bring an action for the death of the child.

In *Schmidt* v. *Menasha Woodenware Company*, 99 Wis. 308, 74 N. W. 797, the Wisconsin court held that an action for death by wrongful act abates on the death of the preferred beneficiary.

In *Walton & Company* v. *Burchel*, 121 Tenn. 715, 121 S. W. 391, where a father and son were killed in the same accident it was held a question of fact for the jury whether the father survived the son an appreciable period of time; if he did, no recovery could be had in behalf of the mother for the death of the son, if the father did not survive, then recovery might be had for the mother.

In *Harvey* v. *Baltimore & Ohio Railroad Company*, 70 Md. 319, 17 Atl. 88, under a statute providing that action for death shall be brought in the name of the state for the benefit of the wife, husband, parent or child, it was held that where the husband died pending an action to recover damages in his behalf for death of his wife, the action could not be prosecuted in behalf of the children of deceased.

Walker et al. v. *Warren Construction Co.*, 95 Or. 125, 186 Pac. 13, was an action for death under the Employers' Liability Act of Oregon. Deceased left surviving him his widow, who at the time was insane, and who died three months after he had been killed. The two plaintiffs were his minor children by a former wife. The court held that the Oregon Liability Act gave priority to the

widow if any, and, if none, a right of action to the children, and said:

> "The widow having been invested with a cause of action by the death of her husband, was at liberty to prosecute it or not. If she did, she was under no obligation to divide the proceeds with any of the decedent's other relatives. If she did not prosecute, either in her own proper person or by guardian, her cause of action died with her and did not pass to another, being personal to herself."

In 8 Ruling Case Law, page 769, Section 52, it is said:

> "By the great weight of authority if the beneficiary first entitled to sue fail to bring the action, this will not transfer the right of action to other persons for whose benefit the action might have been maintained if the person first entitled had not been living when the right of action accrued. The reason for this view is that the statutes giving the right of action to specified persons are construed to create a single cause of action, which accrues immediately on the death of the decedent, and exists for the exclusive benefit of the beneficiary in whom the action vests, so that it cannot be transferred to any other beneficiaries by the death or failure of the first beneficiary to sue, since there never was any right of action for their benefit, in the absence of statute providing for such contingency."

In 17 Corpus Juris, p. 1232, section 78, it is said:

> "If a sole beneficiary or all the beneficiaries entitled at the time of decedent's death die, the right of action is extinguished; it does not pass to beneficiaries of the next class who would have been entitled to it if no one of the prior classes had survived the decedent."

It will be noted how frequently in the foregoing cases the courts have referred, in one way or another, to four propositions: *first*, that the right of action *accrues at the time of death*; *second*, that the administrator is but a *nominal party*, acting as trustee; *third*, as said by Justice Lurton in the Sanders case, that those for whose

benefit the right of action is given are the *real plaintiffs*, and, fourth, that the recovery is for the pecuniary loss of the particular beneficiary to whom the right accrues.

Thus the cases holding that, under similar statutes, the right of action accrues at the time of death to the beneficiary then entitled, and to the exclusion of more remote beneficiaries, are in accord with the decisions of this Court as to the character of the rights created by such statutes, the time of their accrual and the persons in whom they vest. (*Reading Company* v. *Koons, Admr.* 271 U. S. 58; *Chicago, Rock Island & Pacific Railway Company* v. *Schendel, Admr.* 270 U. S. 611; *Michigan Central Railroad Company* v. *Vreeland*, 227 U. S. 59; *Taylor* v. *Taylor*, 232 U. S. 363.)

The Supreme Court of Minnesota admits that its decision in this case does not accord with "*the numerical weight of authority.*" (199 N. W. 101, R. 23.) We respectfully submit that it does not accord with sound reason and entirely disregards the meaning and effect of the words "*if none*" in the statute.

The Minnesota court relied upon two cases construing state statutes, *Morris* v. *Spartanburg Railway Gas and Electric Company*, 70 S. C. 279, 49 S. E. 854, and *Garrard* v. *Mahoning Valley Railway Company*, 100 Ohio St. 212, 126 N. E. 53. Neither of these decisions is persuasive that the construction therein given the state statutes in question could be applied to the Federal Employers' Liability Act. In the South Carolina case the court disposed of the question in a short opinion, referring to but one other case, and that its own prior decision. The South Carolina court made the following remarkable statement:

> "The award of damages for the wrongful death is the important matter, the manner of distribution is of secondary consideration."

Of course, the real question is whether the beneficiary for whom the suit is brought has a right of action. The South Carolina court avoided this controlling question under the guise of "liberal construction." The language of the Federal Employers' Liability Act is plain. It is an ancient doctrine in this Court that where the language of a statute presents no ambiguity the court will not attempt to qualify the meaning by construction. (*Doe* v. *Considine*, 6 Wall. 458.)

Another curious feature of the South Carolina case is that although the father of deceased was referred to as the preferred beneficiary, he brought the suit as administrator *for the benefit of all the heirs at law of deceased* and the Court said, in substance, that as all the brothers and sisters were named in the complaint the action should not abate for want of beneficiaries. Apparently this irregularity influenced the decision.

In the Ohio case on which the Minnesota court also relied (*Garrard* v. *Mahoning Valley Railway Company*, 100 Ohio St. 212, 126 N. E. 53), the trial court and the Ohio Court of Appeals had held that the action did not survive the death of the widow for the benefit of the parents, but the Supreme Court of Ohio brushed aside the authorities with the statement that the decisions of other states brought to its attention were of little assistance because they merely construed particular statutes under consideration, and said, in substance, that it proposed to construe the Ohio statute to suit itself. The Ohio court stressed the idea that the cause of action vested in the administrator, and held that therefore it was the intention of the legislature to provide an existing class of beneficiaries who should respond at the time the administrator instituted his suit. The Minnesota court adopted this theory of the Ohio court, stating (R. 26)

that *the Federal Act vests the right of action in the personal representative.*

This view is not in accord with the weight of authority or with the decisions of this Court in the recent cases of *Reading Company* v. *Koons, Admx.*, and *Chicago, Rock Island & Pacific Railway Company* v. *Schendel, Admx.*, hereinabove referred to. In the *Schendel* case this court reversed the Supreme Court of Minnesota on the very question of interest of an administrator under the Federal Act, this Court holding that the administrator is but a nominal party while the beneficiary is the real party in interest.

In the *Koons* case this Court said, p. 62:

> "For while it is true that the executor or administrator is the person authorized to bring the suit, he nevertheless acts only for the benefit of persons specifically designated in the statute."

The *Koons* and *Schendel* cases were decided by this Court April 12, 1926, after the decision of this case by the Supreme Court of Minnesota.

We respectfully submit that Justice Quinn's dissenting opinion in the court below is a correct statement of the law of this case. He said (R. 29, 158 Minn. 423, 198 N. W. 103):

> "I dissent. The act creates but a single cause of action, which vests in the preferred beneficiary immediately upon the death of the employee. In the instant case the mother was the sole beneficiary in the preferred class. She died May 5, 1921, six months subsequent to the death of the employee, without attempting to enforce her cause of action. In my opinion, the cause of action died with her. Under this statute the surviving dependent relative acquires a right of action at the time of the death of the employee or not at all."

III.

THE SUPREME COURT OF MINNESOTA HAS CONSTRUED THE FEDERAL EMPLOYERS' LIABILITY ACT IN THIS CASE AS IF IT CONTAINED SPECIFIC PROVISIONS WHICH WERE PROPOSED IN CONGRESS, BUT REJECTED.

In 25 Ruling Case Law, Title "Statutes," Section 271, it is stated that

> "The rejection by Congress of a specific provision contained in an act as originally reported has been held most persuasive to the conclusion that the act should not be so construed as in effect to include that provision."

In *Pennsylvania Railroad Company* v. *International Coal Mining Company*, 230 U. S. 184, at p. 198, this Court pointed out that a bill as passed by the Senate contained certain provisions which were omitted from the act as finally reported to both Houses and passed, and the Court said that this was not only significant but conclusive.

In *Duplex Printing Press Company* v. *Deering*, 254 U. S. 443, at 474, the Court said that while it was well established that debates in Congress expressive of the views and motives of individual members are not a safe guide, and hence may not be resorted to in ascertaining the meaning and purpose of the law making body, nevertheless reports of committees of House or Senate stand upon a more solid footing and may be regarded as an exposition of the legislative intent in a case where otherwise the meaning of a statute is obscure, and that this has been extended to include explanatory statements in the nature of a supplemental report made by the committee members in charge of a bill in course of passage, citing cases. The Court then referred to the House and

Senate reports as well as remarks of the spokesman of the House Committee, stating that such remarks were the final word of the House Committee on the subject, and uttered under such circumstances and with such impressive emphasis that it was not going too far to say that, except for this exposition of the meaning of the section, it would not have been enacted in the form in which it was reported.

The legislative history of the provision of Section One of the Federal Employers' Liability Act involved in this case, begins with the Act of June 11, 1906, 34 Stat. 232, which was held unconstitutional on other grounds in the *Employers' Liability Cases*, 207 U. S. 463. Although the statute was in other respects invalid, the part in question in this suit was readopted in the Act of April 22, 1908, 35 Stat. 65, which was sustained by the court in *Second Employers' Liability Cases*, 223 U. S. 1. The same language was adopted to the amendment of April 5, 1910, c. 143, Sec. 2, 36 Stat. 291.

The bill which ultimately became the Act of June 11, 1906, originated in the House of Representatives (H. R. 239, 59th Cong., 1st Sess.). As introduced, the bill provided that in case of death of an employee the carrier should be liable "*to his heirs at law.*" However the House Committee on Interstate and Foreign Commerce reported an amendment to the bill striking out the words "*heirs at law*" and inserting in lieu thereof the following:

> "personal representatives, for the benefit of his widow and children, if any, if none, to his next of kin dependent upon him." (House Report No. 2283, 59th Congress, 1st Session, March 15, 1906.)

When this bill was before the House, Representative Driscoll offered an amendment to substitute for the last quoted language, a provision that the personal represen-

ative might maintain an action to recover damages *for the husband or wife and next of kin*" to be "*distributed as unbequeathed assets after payment of all debts and expenses of administration.*" (Vol. 40, pt. 5, Cong. Rec. 59th Cong., 1st Sess., p. 4601.) Mr. Driscoll's amendment was not adopted (Vol. 40, pt. 5, Cong. Rec. 59th Cong., 1st Sess., p. 4601) and the House passed the bill with the amendment reported by the committee, providing for "*the widow and children, if any, if none the next of kin dependent upon him.*" (Vol. 40, pt. 5, Cong. Rec. 59th Cong., 1st Sess., p. 4601.)

While H. R. 239 was under consideration in the House, two bills of like character were introduced in the Senate (S. 156 and S. 1657), each of which provided that a carrier should be liable, in case of death of an employe "*to his heirs at law.*" (Vol. 40, pt. 2, Cong. Rec. 59th Cong., 1st Sess., p. 1747.) When H. R. 239, as amended, had passed the House it was referred to the Senate Committee on Interstate Commerce (Vol. 40, pt. 6, Cong. Rec. 59th Cong., 1st Sess., p. 4633), which took no further action on either Senate bill, but reported the House bill. (Vol. 40, pt. 8, Cong. Rec. 59th Cong., 1st Sess., p. 7075 and Senate Report 3629, 59th Cong. 1st Sess.) Senator LaFollette offered an amendment inserting, after the word "*none*," the words "*then for his parents, if none, then*," so that as amended, the clause read:

> "in case of death, to his personal representative for the benefit of his widow and children, if any; if none, then for his parents; if none, then for his next of kin dependent upon him."

Referring to his amendment (Vol. 40, pt. 8, Cong. Rec. 59th Cong. 1st Sess., p. 7206) Senator LaFollette said:

> "The purpose of this amendment will be at once apparent. In case of recovery for the death of an employe, it makes the parents of the deceased the

> beneficiaries where the employe leaves neither wife nor child. If there be no parents then the next of kin dependent will recover. I am satisfied the fairness of the amendment will commend itself to the Senate."

The amendment was adopted by the Senate, (Vol. 40, pt. 8, Cong. Rec. 59th Cong., 1st Sess., p. 7696) and the bill, as amended, passed. (Vol. 40, pt. 8, Cong. Rec. 59th Cong., 1st Sess., p. 7696.) The House concurred in the Senate amendment (Vol. 40, pt. 8, Cong. Rec. 51st Cong., 1st Sess., p. 7972) and the bill was approved by the President June 11, 1906. (Vol. 40, pt. 9, Cong. Rec. 51st Cong., 1st Sess., p. 8740.)

The bill which became the Federal Employers' Liability Act of April 22, 1908, 35 Stat. 65, originated in the House of Representatives (H. R. 20310, 60th Cong., 1st Sess.) and as reported by the Committee on Judiciary, to which it had been referred, contained the following language:

> "Or, in case of the death of such employe, to his or her personal representative for the benefit of the surviving widow or husband and children of such employe, and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe." (Vol. 42, pt. 5, Cong. Rec. 60th Cong., 1st Sess., p. 4836.)

Comparison of the foregoing with the like provision of the Act of June 11, 1906, shows that the two are substantially the same:

Act of June 11, 1906.	Act of April 22, 1908.
"or, in the case of his death	or in case of the death of such employe
to his personal representative	to his or her personal representative
for the benefit of his widow and children, if any;	for the benefit of the surviving widow or husband and children of such employe
if none, then for his parents;	and, if none, then of such employe's parents
if none, then for his next of kin dependent upon him."	and if none, then of the next of kin dependent upon such employe."

H. R. 20310 was accompanied by a Report of the Committee on Judiciary (House Report No. 1386, 60th Cong. 1st Sess.), which contained a summary of many of the state laws on death by wrongful act, showing the varying provisions thereof as to rights of beneficiaries.

H. R. 20310 passed the House without amendment of the clause in question. (Vol. 42, pt. 5, Cong. Rec. 60th Cong., 1st Sess., p. 4439.) In the meantime several such bills had been introduced in the Senate, one of which, S. 5307, was referred to the Committee on Labor. (Vol. 42, pt. 2, Cong. Rec. 60th Cong., 1st Sess., p. 1965.) The Committee submitted Senate Report 460 (60th Cong., 1st Sess.), stating that the bill was so limited as to confine its application to employes engaged in interstate commerce, and stated: "In other respects the measure follows the act passed two years ago." The bill, S. 5307, printed in the Congressional Record (Vol. 42, pt. 5, Cong. Rec. 60th Cong., 1st Sess., p. 4530), contains the same language as to beneficiaries as the House Bill, H. R. 20310.

After debate, the Senate passed the House Bill (Vol. 42, pt. 5, Cong. Rec. 60th Cong., 1st Sess., p. 4551), and it was approved by the President April 22, 1908. (Vol. 42, pt. 6, Cong. Rec. 60th Cong., 1st Sess., p. 5197.)

The bill which became the Act of April 5, 1910, 36 Stat. 291, originated in the House of Representatives. (H. R. 17263.) As introduced, this bill added to the Act of April 22, 1908, provisions as to where suit might be brought and for concurrent jurisdiction of state courts, and added Section 9, providing for survival of an action for damages suffered by an injured employee, to his personal representatives

> "for the benefit of the surviving widow or husband and children of such employe, and, if none, then of such employe's parents, and, if none, then of the

next of kin dependent upon such employee, et
(House Report No. 513, 61st Cong., 2nd Sess., p.

Representative Sterling in charge of the bill sta

"This amendment provides that the action s
survive to the personal representative for the b
fit of the widow or next of kin in the order nam
in the original law." (Vol. 45, pt. 3, Cong. Rec.
Cong., 2nd Sess., p. 2253.)

The House made no change in this language of S
tion 9. When the bill (H. R. 17263) reached the Sen
several amendments were proposed to the provisions
Section 9 regarding beneficiaries. Senator Hale p
posed an amendment reading:

"Such right of action shall survive and may
prosecuted by the next heir or legal representat
of the deceased plaintiff in the order of preced
fixed by the law of the state where the trial ta
place. Any sums recovered and paid in such a
shall be received and distributed in the order p
by law in such state." (Vol. 45, pt. 4, Cong. R
61st Cong., 2nd Sess., p. 4045.)

Senator Heyburn moved to strike out the provis
of Section 9 as to who should be beneficiaries and
amend the section so same would read:

"That any right of action given by this Act
a person suffering injury shall survive to his or
personal representative, to be distributed under
law of the state or territory in which such right
action accrued." (Vol. 45, pt. 4, Cong. Rec.
Cong., 2nd Sess., p. 4048.)

Senator Nelson proposed the following amendmen

"That any right of action given by this Act
a person suffering injury shall survive to his or
personal representative for the benefit of the
tate of the deceased." (Vol. 45, pt. 4, Cong. R
61st Cong., 2nd Sess., p. 4049.)

When Senator Hale called up his amendment, ab
quotes, the following occurred. (Vol. 45, pt. 4, Co
Rec. 61st Cong., 2nd Sess., p. 4063.)

"Senator Burkett. Will the Senator let me

his attention to the first paragraph of the law which provides where this liability shall run? The law as it now is in the first section provides that 'In case of the death of such employe, to his or her personal representative for the benefit of the surviving widow, etc.' Those are the same words that this bill contemplates.

Senator Hale: Undoubtedly.

Senator Burkett: If the Senator's amendment should be adopted would we not have to change the first section of the law?

Senator Hale: If the amendment is agreed to that can very easily be done by an amendment in forma."

Senator Rayner suggested an amendment to Senator Hale's amendment, so as to make same provide:

"That the action shall survive and may be prosecuted as such actions are prosecuted by the law of the state where the trial takes place." (Vol. 45, pt. 4, Cong. Rec. 61st Cong., 2nd Sess., p. 4122.)

Senator Hale consented to Senator Rayner's amendment as a substitute. The secretary read the amendment, as follows:

"Section 2. That any right of action given by this Act to a person suffering injury shall survive and may be prosecuted as such actions are prosecuted by the laws of the state where the trial takes place. Any sum recovered and paid in such suit shall be received and distributed in the order fixed by law in such state." (Vol. 45, pt. 4, Cong. Rec. 61st Cong., 2nd Sess., p. 4123.)

Thereupon the following occurred: (Vol. 45, pt. 4, Cong. Rec. 61st Cong., 2nd Sess., p. 4123):

"Mr. Brandegee: Mr. President, I want to call attention to the fact that if that amendment should prevail, it seems to me it would be in direct conflict with the first section of the bill that we are amending.

Mr. Hale: Mr. President, that has been suggested before; but it will be a very easy thing to adapt the first section to the amendment if it is adopted by the Senate."

Thereupon a vote was taken on a Hale-Rayner amendment, as above quoted, and the amendment was rejected. (Vol. 45, pt. 4, Cong. Rec. 61st Cong., 2nd Sess., p. 4123.)

Senator Heyburn then offered an amendment to Section 9, striking out everything after the word "representative" down to and including the word "employe", and inserting in lieu thereof the following:

> "to be distributed under the law of the state or territory in which such right of action accrues." (Vol. 45, pt. 4, Cong. Rec. 61st Cong., 2nd Sess., p. 4123.)

The Senate voted to reject this amendment proposed by Senator Heyburn. (Vol. 45, pt. 4, Cong. Rec. 61st Cong., 2nd Sess., p. 4124.)

On April 1st the bill, with the same language as to beneficiaries as contained in Section 1 of the Act of April 22, 1908, was passed by the Senate (Vol. 45, pt. 4, Cong. Rec. 61st Cong., 2nd Sess., p. 4124), and on April 9, 1910, was approved by the President. (Vol. 45, pt. 4, Cong. Rec. 61st Cong., 2nd Sess., p. 4450.)

Thus it appears that the bills introduced in the 59th Congress, which became the Act of June 11, 1906, provided that the recovery for death should go to the *heirs at law*, without restriction as to what relatives should be entitled to priority. The House Committee substituted the priority provisions of the present law. An amendment giving the recovery to the husband and wife or next of kin, to be distributed as unbequeathed assets, was defeated. The Senate bills at the same session, as *introduced*, provided the recovery should go to the *heirs at law* but the Senate Committee adopted the language of the House bill and the Senate adopted Senator La Follette's amendment "*then for his parents, if none then etc.*," in which the House concurred. What could be more persuasive or more conclusive that Congress

did not intend the result reached by the Supreme Court of Minnesota in this Case?

The language of the Act of June 11, 1906, was carried forward into the substantially identical provisions of the Act of April 22, 1908.

The Act of April 5, 1910, adapted the language of Section 1, to the new Section 9, and efforts to amend both sections to provide for *distribution* of the recovery were debated and rejected by the Senate.

In *Fulgham* v. *Midland Valley Railroad Company*, 167 Fed. 660, at 664, in referring to the Federal Employers' Liability Act, the court said:

> "It cannot be that legislation so much discussed in and out of Congress, and which had to be so carefully matured and drawn in order to meet the views of the courts, legislation, too, which inherently shows the skill of the lawyer evidently familiar with the settled principles of the common law, which it modifies in the interest of justice and humanity, is not expressive of the will of Congress, or omits anything which Congress intended to do by it."

IV.

THE INTENTION OF CONGRESS IS MANIFEST FROM THE FACT THAT IT DID NOT ADOPT THE PROVISIONS OF LORD CAMPBELL'S ACT AND THE NUMEROUS STATE STATUTES WHICH GIVE THE CAUSE OF ACTION FOR DEATH FOR THE BENEFIT OF THE WIDOW, HUSBAND, CHILDREN, PARENTS AND NEXT OF KIN, WITHOUT PRIORITY.

Lord Campbell's Act provides that the action:

> "shall be for the benefit of the *wife, husband, parent, and child* of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; *and the amount so recovered, after deducting costs not recovered from the defendant shall be distributed among the aforementioned parties in such shares as the jury by their verdict shall find and direct.*" (9 and 10 Vict. c. 93; Tiffany, Death by Wrongful Act, sec. 21.)

Under Lord Campbell's Act and like statutes of some of the states*, the right of action vests at once for the benefit of all persons entitled to receive any part of the money recovered and may be maintained as long as any one of such persons survives, damages to be apportioned by the jury or under the statutes of descent. (*Woodward v. Chicago & North Western Railway Company*, supra, and *Hammond v. Lewiston, Augusta & Waterville Street Railway*, supra.)

This Court pointed out the distinction between the

* The statutory provisions of all the states are found in "Analytical Table showing in comparative form the leading provisions of the statutes now in force governing actions for personal injuries resulting in death." Pages xix to lxxi, Tiffany, Death by Wrongful Act, 2d Ed.

Federal Act and a state statute like Lord Campbell's Act, in *St. Louis-San Francisco & Texas Railway Company* v. *Seale*, 229 U. S. 156, p. 158:

> "The Texas statute gave the right of action to the 'surviving husband, wife, children and parents' and provided that it might be enforced by all of them or by one or more for the benefit of all, while the Federal statute vested the right of action in the deceased's 'personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next kin dependent upon such employee.'"

In enacting the Federal Employers' Liability Act, it must be assumed that Congress was familiar with Lord Campbell's Act.* The fact that Congress did not adopt Lord Campbell's Act literally, but changed the language relating to beneficiaries, manifests a plain intention of Congress to give effect to whatever change of meaning naturally resulted therefrom. Where a statute is adopted a change in phraseology creates a presumption of a change in intent. *(Crawford* v. *Burke*, 195 U. S. 176, 190.)

Also, it may be assumed that Congress was familiar

*Senator Sutherland: "Let me put into the record a statement of this general subject taken from the Eighth Volume of the American and English Encyclopedia of Law.

"Death by wrongful act. • • • The earliest of the statutes was the English Act of 1846 (9 and 10 Vic. c. 93), commonly known as Lord Campbell's Act. This enactment has served as the model for much of the subsequent legislation on the subject • • • It then conferred a right of action on the personal representatives for the benefit of the wife, husband, parent, and child of deceased. • • • In the United States statutes of like purpose and containing provisions more or less similar have been enacted. There are, however, numerous minor differences. In some the right of action is vested directly in the widow, next of kin, or other beneficiaries. In some, as under Lord Campbell's Act, in the personal representative of the deceased."

(Vol. 45, Pt. 4, Cong. Rec. 61st Cong., 2nd Sess., p. 4096.)

Senator Rayner: "That is exactly the power they have under the English Act. The jury has the power to apportion, and a number of states have taken Lord Campbell's Act in that way." (Vol. 45, Pt. 4, Cong. Rec. 61st Cong., 2nd Sess., p. 4048.)

with the statutes of the different states. Indeed, we need not rely upon mere assumption because the Report of the House Committee on Judiciary, which accompanied the bill adopted as the Federal Employers' Liability Act of April 22, 1908 (House Report No. 1386, 60th Congress, 1st Sess.) contained a summary of many of the state laws giving actions for death by wrongful act.*

Throughout the debates of Congress many references were made by members to the statutory provisions of their own states.**

*This Report refers to state laws giving a right of action for death for the benefit of the "heirs" of deceased (House Report No. 1386, 60th Congress, 1st Sess., p. 32); others for the "widow and heirs" (House Report No. 1386, p. 35); others to the "*personal representative*" (House Report No. 1386, pp. 63, 69); others to "Heirs or *personal representative*" (House Report No. 1386, p. 62). The Report also contains summaries of a number of state laws by which the beneficiaries were restricted to classes, as the Massachusetts statute referred to on page 16, House Report No. 1386, providing priority to the widow or if no widow, to the next of kin dependent; the California statute providing for recovery by the personal representative for the benefit of the widow, children dependent parents and dependent brothers and sisters "*in the order of precedence stated*" (House Report No. 1386, p. 31); the Missouri statute is referred to on page 50 of the same Report as providing an action for death first by the husband or wife of deceased or second, if there be no husband or wife, by the minor child etc. On page 54 of the same House Report reference is made to the Nebraska statute of 1907 giving a cause of action for death to "*the personal representative for the benefit of the widow and children if any, if none then to the parents, if none then to the next of kin dependent*" and on page 55 of the Report is reference to the identical provisions of the Nevada statute. On page 64 of the same Report is reference to the Porto Rico statutes providing for action by "*the widow and children or if there be no such widow or children then by the parents*" and on page 67 of the Report is a summary of the South Dakota statute giving the action "*to the personal representative for the benefit of the widow and children if any, if none, then for the dependent next of kin*."

**Senator Cummins said: "For instance in the state which I come from the action survives in behalf of the administrator of the estate; in the State of Illinois the action survives. I think in behalf of the widow or next of kin." (Vol. 45, Pt. 4, Cong. Rec. 61st Cong., 2nd Sess., p. 4096.)

Senator Sutherland said: "We may say that the right of survivorship shall attach only to the widow; we may say that it shall attach only to the children, or both, or to all of kin. If the Senator will examine the laws of the various states upon this question he will find that they vary greatly. In some of the states the right of survivorship is limited to certain of the kin; the close heirs; in others it is broadened." (Vol. 45, Pt. 4, Cong. Rec. 61st Cong., 2nd Sess., p. 4096.)

Senator Rayner: "In no state for instance, these actions are brought in name of the state of Maryland. * * * We have adopted Lord Campbell's Act." (Vol. 45, Pt. 4, Cong. Rec. 61st Cong., 2nd Sess., p. 4122.)

Some state laws make special provisions for remote beneficiaries, as in Texas the amount recovered is divided among the beneficiaries *who shall be living at the time of distribution.* (*Houston & Texas Central Railway Company* v. *Moore*, 49 Tex. 31.) A Missouri mining statute specifically provides that where the widow dies within the period of limitations, the children may take. (*Pace* v. *Watson*, 92 Mo. App. 89.)

In some states, as Colorado and North Dakota, the statutes create distinct classes of beneficiaries but provide specifically that if the beneficiary of a class entitled does not exercise the right of action within a given time, the next class, after due notice, may be substituted. (*Harshman* v. *Northern Pacific Railway Company*, 14 N. D. 69, 103 N. W. 412; *Hopper* v. *Denver & Rio Grande Railroad Company*, 155 Fed. 273.)

These special statutory provisions giving rights to remote classes of beneficiaries, where there are preferred beneficiaries, emphasize the necessity of such positive enactments.

The fact that Congress did not adopt the language of the statutes of New York, Pennsylvania, Texas or other states which give an action for death for the benefit of all surviving relatives, the proceeds to be distributed according to the laws of descent, indicates that it did not intend such distribution.

Congress did not adopt a statute like Colorado or North Dakota, specifically providing for substitution of a remote beneficiary, if the first beneficiary failed to enforce his or her cause of action.

If Congress had intended such result as has been reached by the Supreme Court of Minnesota in this case, "it would have been easy to have said so," applying the

familiar expression of this court in cases where efforts have been made to change the plain meaning of statutes. (*Tillson* v. *U. S.*, 100 U. S. 43, 46; *Baltimore & Ohio Railroad Company* v. *Grant*, 98 U. S. 398, 403; *United States* v. *Detroit First National Bank*, 234 U. S. 245.)

V.

CONGRESS ADOPTED THE TYPE OF STATUTE CLASSIFYING BENEFICIARIES, WITH PRIORITIES, WHICH HAD BEEN IN FORCE IN MANY STATES LONG PRIOR THERETO. THE AUTHORITATIVE CONSTRUCTION THEREOF BY THE STATE COURTS IS PRESUMED TO HAVE BEEN ADOPTED WITH THE STATUTE.

Statutes on death by wrongful act with priority classification of beneficiaries, like Congress adopted in the Federal Employers' Liability Act, had been in effect many years prior to the passage of that act, and had been construed in well reasoned opinions. The leading case of *Woodward* v. *Chicago & North Western Railway Company*, 23 Wis. 400, above referred to, was decided in 1868.

It is significant that the words "*then for his parents; if none,*" (then for his next of kin, etc.), which gave the right of action in this case to the mother and excluded the sister, were inserted in the Act by amendment introduced by a Senator from Wisconsin, who was an able lawyer and certainly familiar with the death statute of his own state and the construction thereof by the Supreme Court of Wisconsin. (Senator La Follette's Amendment, Vol. 40, Pt. 8, Cong. Rec. 59th Cong., 1st Sess., p. 7696, hereinabove referred to, page 39). *Bean* v. *Louisville & Nashville Railroad Company*, 94 Tenn. 388, 29 S. W. 370, was decided in 1895. Justice Lurton's opinion in *Sanders, Admr.* v. *Louisville & Nashville Railroad Company*, 111 Fed. 708, was in 1901. The Indiana case, *Dillier* v. *Cleveland, Cincinnati, Chicago & St. Louis Railway Company*, 72 N. E. 271, was decided in 1904.

At the time the first Federal Employes' Liability Act was passed in 1906, it was settled by the great weight

of authority,* that if a statute creates distinct classes of beneficiaries, remote beneficiaries have no interest after the death of a preferred beneficiary for whose benefit the cause of action has accrued at the death of the injured person.

Congress had authoritative construction of the language which it selected for the Employers' Liability Act.

Congress having adopted the form of statute creating classes of beneficiaries, we respectfully submit that the authoritative construction of such statutes in the states where same had been in force for many years ought to be applied to the Act of Congress.

In *Jennings* v. *Alaska Treadwell Gold Mining Company*, 170 Fed. 146, the Circuit Court of Appeals, Ninth Circuit, pointed out that in enacting Sec. 353 of the Alaska Code (31 Stat. 392) giving an action for death by wrongful act, Congress adopted substantially Sec. 34 of the Oregon Code; that two years before the adoption of the Alaska Code by Congress the like section of the Oregon Code had been construed by the Supreme Court of Oregon, and the Circuit Court of Appeals applied the construction of the Oregon statute, by the Oregon court, to the section of the Alaska Code, under the rule that such construction was presumed to have been adopted with the statute, citing a large number of authorities.

It is a familiar rule that where a state statute is literally or substantially adopted by Congress, the judicial construction already placed upon it by the courts of the state where it originated accompanies the statute and is to be treated as incorporated therein. (*Capital Traction Company* v. *Hof*, 174 U. S. 1, 36; *Wallis* v. *Eastern Trust Company*, 169 U. S. 295; *Metropolitan Railroad Company* v. *Moore*, 121 U. S. 558.)

*At that time the only decision to the contrary was *Morris* v. *Spartanburg Railway, Gas & Electric Company*, 70 S. Car. 270, 49 S. E. 854 (Nov. 21, 1904), hereinafter discussed, p. 34

VI.

THE EVIDENCE DID NOT ESTABLISH DEPENDENCY ESSENTIAL TO A CAUSE OF ACTION FOR THE BENEFIT OF A SISTER UNDER THE FEDERAL ACT.

This judgment is in favor of a sister claiming as a beneficiary of the third class, "next of kin, dependent upon such employee." Widows, children and parents—beneficiaries of the first and second classes—need show only "some reasonable expectation of pecuniary assistance or support of which they have been deprived," (*Michigan Central Railroad Company* v. *Vreeland*, 227 U. S. 59) but to establish a right of action for a sister, *actual dependency* must be shown (*Garrett* v. *Louisville & Nashville Railroad Company*, 197 Fed. 715, 719, 722; *Moffett* v. *Baltimore & Ohio Railroad Company*, 220 Fed. 39).

In this case there is no claim of want or necessity on the part of the sister. She is an intelligent, ablebodied woman, of mature years, mentally and physically able to take care of herself. For six years she had done so, working in clerical positions in Chicago. After the death of the mother and brother, the sister returned to work in Chicago where she was working at the time of trial. She was not thrown upon the suport of her brother by necessity or misfortune, but in 1917 merely changed her employment. Apparently the deceased brother had assumed full responsibility for the care of the aged and invalid mother, living in her home but keeping it up and supporting her out of his earnings. He needed a housekeeper; the mother needed care. The brother went to Chicago and by promising the sister "more money than she could earn in Chicago", induced her to give up her position in Chicago and take the job of housekeeping for

him. Of course natural affection and sympathy for her infirm mother must have influenced her to some extent, but has nothing to do with the question of dependency on her brother. What she did for her brother was compensated for in money. He had never given her any money prior to the time she went back to Iowa to keep house for him and if she had stayed in Chicago he would not have given her anything. The payments were made regularly, twice a month. She was dependent on her brother only in the sense that any employee is dependent upon the employer while the relation continues. Her arrangement with her brother was terminated by his death and was not of a character which constitutes a legal basis for a cause of action under the Federal Employer's Liability Act. The trial judge said that the question was not free from doubt (R., 100), although he did not feel warranted, under the Minnesota practice, in setting aside the verdict.

In *Ducall* v. *Hunt*, 34 Fla. 85, 15 So. 876, the court said:

> "We think that when the suit is brought by a person who bases his right to recover upon the fact that he is dependent upon the deceased for support, then he must show, regardless of any ties of relationship or strict legal right to such support, that he or she was, either from the disability of age, or non-age, physical or mental incapacity, coupled with a lack of property means, dependent in fact upon the deceased for a support. There must be, when adults claim such dependency, an actual inability to support themselves, and an actual dependence upon someone else for support, coupled with the reasonable expectation of support, or with some reasonable claim to support from the deceased."

In *Southern Railway Company* v. *Vessel*, 192 Ala. 440, 68 So. 336, it was held, under the Federal Employer's Liability Act, that a married sister of a deceased employee was not dependent, merely because she had a moral

claim upon deceased or because he had been paying her regularly for his board.

Hodnett v. Boston & Albany Railroad Company, 156 Mass. 86, 30 N. E. 224, was a suit by a sister, under the death statute of Massachusetts, for damages resulting from her brother's death. The Court held that the evidence did not establish dependency necessary to maintain the action, and said:

> "On the question of dependency, the only evidence was the testimony of the plaintiff herself that she was his half-sister, and had two children; that he used to come in and see her, and sometimes gave her money; that he sent her money every other week or so to pay her rent; *that she had no other means of support but her earnings, and since his death had had to support herself.* There was nothing to show what her earnings or her expenses of living were, or that she was in fact dependent upon his wages for support." (Italics ours.)

In *Bertle v. Northern Pacific Railway Company*, 60 Wash. 552, 111 Pac. 788, in passing on a claim by parents for the death of an adult son, under a statute conferring a right of action only on those dependent upon deceased, the court said:

> "Nevertheless, there must be some degree of dependency, some substantial dependency, *a necessitous want on the part of the parent, and a recognition of that necessity on the part of the child.* Such, we believe to be the general interpretation of like statutes. * * *
>
> "The evidence here does not bring respondents within the statute. They were in no sense dependent upon the deceased for support. The father was able to follow a daily vocation, and if his earnings only resulted in an average income of $40 per month, that was the result of his inability to sell more goods, and not his inability to solicit the sale. His necessity must not be judged from his unsuccessful effort to make a larger income, but from his physical ability to make the effort. Neither does an occa-

> sional contribution from a son to a parent estab
> lish a condition of dependency. There must be
> substantial need on one side and a substantia
> financial recognition of that need on the other sid
> to make out a dependency within the meaning of thi
> statute."

Evidence of contributions, where there is no evidenc
of actual necessity on the part of the beneficiary
where the evidence tends to show that the beneficiar
was not actually dependent upon the deceased, does no
show dependency within the statute. (*Trammell* v. *South
ern Railway Company*, 182 Fed. 789; *Southern Railway
Company* v. *Vessell*, 192 Ala. 440, 68 So. 336; *Atlanti
Coast Line Railway Company* v. *McDonald*, 155 Ga. 63
70 S. E. 249; *Georgia Railroad & Banking Company*
Spanks, 111 Ga. 371, 36 S. E. 855; *Bostic* v. *Northe
Pacific Railway Company*, *supra*.)

In *Illinois Central Railroad Company* v. *Doherty'
Admr.*, 153 Ky. 363, 155 S. W. 1119, an action by an ad
ministrator under the Federal Employer's Liability Ac
for the benefit of brothers and sisters of deceased, th
evidence disclosed that deceased left surviving him sev
eral brothers and two sisters, one a Sister of Charity
residing in a convent, who received no support from th
decedent in his lifetime, and the other sister marrie
and living in Ireland. There was some testimony tha
the decedent had borrowed money to send to his sister
Ireland, but whether the money was sent her in payme
of a debt or for her support was not disclosed. *No ev
dence was introduced to show that the husband in Irela
was unable to support his wife.* There was no evidenc
that any of the brothers were dependent upon the d
ceased. The court held there could be no recovery und
the Federal Act.

The wording of the statute is significant. The wor
"*dependent*" is not used in the clauses giving a right

action to the widow, children or parents; only in dealing with collateral relatives did Congress condition the right of recovery upon their being "*dependent upon such employee.*" The plain purpose of the statute was to provide that collateral relatives who had found it necessary to rely upon the deceased employee for support, should not be left *in want*. Clearly an adult sister claiming under this section must show actual inability to support herself. The statute does not contemplate that interstate carriers should pay damages to adult, collateral relatives of deceased employees, if such relatives are able to take care of themselves and have done so, both before and after the death of the employee.

We respectfully submit that the judgment of the Supreme Court of the State of Minnesota should be reversed.

Respectfully submitted,

Counsel for Petitioner.

Of Counsel.

OCT 20 1927
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1927.

No. 57

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,

Petitioner,

vs.

WELLS DICKEY TRUST COMPANY, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF ELMER E. ANDERSON, DECEASED,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

REPLY BRIEF FOR PETITIONER.

DENEGRE, MCDERMOTT, STEARNS & STONE,
J. A. CONNELL,
J. C. JAMES,
Counsel for Petitioner.

BRUCE SCOTT,
Of Counsel.

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OCTOBER TERM, 1927.

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

REPLY BRIEF FOR PETITIONER.

I.

Under the Federal Employers' Liability Act the Cause of Action Does Not Vest in the Personal Representative.

The argument of counsel for respondent, page 3, that the cause of action created by the Federal Employers' Liability Act *vests in the personal representative*, can-

not be reconciled with the following decisions of this court:

> The cause of action under the Federal Act is not in the personal representative and a prior judgment against the beneficiary is a bar to suit by the administrator. *C. R. I. & P. Ry. Co.* v. *Schendel*, 270 U. S. 611.
>
> Where a sole beneficiary brought suit in her individual capacity, an amendment describing her as administratrix did not state a new cause of action and might be allowed even though the period of limitation had run. *M. K. & T. Ry.* v. *Walt*, 226 U. S. 570.
>
> The cause of action for death under the Federal Act accrues on the death of the employee and the limitation begins to run from that time, regardless of when an administrator may be appointed. *Reading Co.* v. *Koons*, 271 U. S. 58.

Counsel do not explain what becomes of the cause of action, under their theory, prior to the appointment of the administrator. It must have vested in some one at the time the limitation began to run. As the cause of action accrues on the death of the employee and the beneficiary is the real party in interest, it follows that the right of the beneficiary can accrue only at the time of the death of the employee.

Counsel are driven to the position that the rights of the beneficiaries do not accrue until the time of trial. They argue, page 3, that any *recovery* goes to the beneficiaries named in the order stated in the act. If so the word "*surviving*" in the statute must refer to the time of the recovery of damages. The only death mentioned in the statute is the death of the employee and to that alone can the word "surviving" refer. In the *Koons* case the court said, page 60, that the Federal Act "*gives a right of action to the personal representative of the surviving spouse and children of such employee, or if*

there are no such survivors, then for the benefit of the next of kin." The *survivors* are such preferred beneficiaries as survive *the deceased employee.*

At page 62 in the *Koons* case the court said: "*At the time of death there are identified persons for whose benefit the liability exists.*" Rights of beneficiaries must accrue then or not at all.

The mother's claim accrued at once on Anderson's death. The statute makes no provision for later events; it makes no reference to deaths of beneficiaries. It does not provide for distribution of the damages recovered, as is done by Lord Campbell's Act. It provides for several classes of beneficiaries, but the actual and sole beneficiary is determined at the death of the employee. That the mother was the sole beneficiary at the time of death of Anderson is settled by *St. L. S. F. & T. Ry. Co.* v. *Seale*, 229 U. S. 156, *Taylor* v. *Taylor*, 232 U. S. 663, and *N. O. & N. E. R. Co.* v. *Harris*, 247 U. S. 367. Counsel do not claim that the right of the mother was transmitted to the sister. This suit is not for damages sustained by the mother. It is a different cause of action, for the damages sustained by the sister. Such a right of action could have arisen only if the sister had been the sole beneficiary at the time of the employee's death.

Counsel say, page 12, that they fail to grasp the vital significance which we seek to attach to the words "if none." All the conditions under which this statutory action accrues at the time of the death of the employee, must necessarily relate to that time. The controlling words "if none" require that a sister of a deceased employee, claiming the action for the death, must show that at the time the action accrued there was no widow, child or parent.

II.

The Judgment in This Case Is on a Different Cause of Action from That Which Arose on the Death of the Employee.

On page 5 counsel boldly deny that the judgment in this case is on a different cause of action from that which arose on the death of the employee. They ignore Judge Taft's opinion in the *Hooper case* (92 Fed. 820), that under such a statute a suit by an administrator for one beneficiary is a different suit from a suit by the administrator for another beneficiary and that a change of beneficiaries, under such a statute, changes the suit, the amount of recovery and states a new and different cause of action. All that counsel say on pages 5 and 6 about there being but a single wrongful act is applicable to the fact in the *Hooper* case, but counsel do not refer to the other essential element of a cause of action of this character, *i. e.*, the pecuniary injury sustained by the particular beneficiary.

If a suit had been brought by an administrator of Anderson's estate for the benefit of Anderson's mother and she had died before the trial, an amendment setting up the death of the mother and alleging that the sister was Anderson's dependent next of kin, *would have stated a new cause of action*, the damages would have been different and the party in interest would have been different. There cannot be a new cause of action for the benefit of the sister, different from the cause of action of the mother, because but a single cause of action for the death of an employee accrues at his death. At the time the cause of action for Anderson's death accrued, his mother was the sole beneficiary. Under the statute, the

only right to be compensated in damages was *her* right to be compensated for *her* loss. At Anderson's death, the sister had no right to damages for any loss *she* might have sustained by reason of her brother's death. Nothing in the statute gave her any rights on the death of her mother.

III.

The Sister Did Not Became Entitled to the Benefit of the Suit By or Through the Death of the Mother.

Counsel say on page 11: "After her death (death of mother) *the sister thereby becoming entitled* to the fruits of the suit, etc." However, they do not explain *how* the sister became entitled to the fruits of the suit. Not through inheritance from her mother; the judgment is not for damages which the *mother* sustained by reason of Anderson's death. The death of the mother could not operate to transmit the right of action to the sister. Surely the statute does not create new causes of action for successive beneficiaries in turn. The possibility of such construction is precluded by the accrual of the cause of action on the death of the employee and the running of the limitation from that date.

IV.

At the Time of the Death of the Employee There Were Not Two Beneficiaries; the Mother Was the Sole Beneficiary. The Sister Had No Right of Action and the Death of the Mother Did Not Deprive the Sister Thereof.

On page 16 counsel make an astonishing statement, as follows:

> "At the time of such death (referring to the death of the employee) there were *two* beneficiaries coming within the terms of the Act, the mother coming within the second class named and the sister within the third class."

This assertion utterly disregards the plain language of the statute and the decisions of this court in many cases, for example, in the *Seale* case where this court said that as there was a surviving widow, the father and mother of the deceased were not beneficiaries under the Federal statute. In the *Harris* case a dependent mother could not recover because the widow, although she had abandoned the deceased, was sole beneficiary under the statute. At the time of Anderson's death there were not two beneficiaries; there was but *one*. The mother was the only beneficiary. The cause of action was for the *mother's loss*, to the complete exclusion of any loss the sister might have sustained.

Counsel then ask:

> "Why should the circumstance that the beneficiary in the second class (mother) died before recovery could be had, *deprive* the other beneficiary of a recovery for the wrong done?"

The death of the mother did not *deprive* the sister of a recovery. The sister never had any right or interest

in the cause of action. The mother having survived the deceased, the statute did not provide a recovery for any loss the sister might have sustained by her brother's death. She had nothing to be *deprived* of and was in no different position whether her mother lived or died. *Is it not more pertinent to inquire how the sister would acquire, through the death of the mother, a right of action which she otherwise did not have?*

V.

State Statutes Like the Federal Act Have Been Construed Uniformly as Creating a Single Cause of Action, which Accrues at the Time of the Death, and as Giving the Beneficiary a Right of Action Then or Not at All.

In every other case but this, a statute like the Federal Act, classifying beneficiaries with priorities, has been construed as creating a single cause of action which accrues at the time of the death, and a giving the beneficiary a right of action then or not at all. Counsel seek to brush aside all these decisions by asserting on page 2, and again on page 7, that the state statutes there under consideration are different from the Federal Act, but counsel do not point out the alleged differences.

In dealing with these decisions in our original brief we made long quotations to demonstrate that each statute considered had priority provisions like the Federal Act and that under such statutes the courts have held unanimously that the right of action accrues at the death of the employee, that the administrator is but a nominal party, and that the recovery is for the pecuniary loss of the particular beneficiary to whom the right accrues, who

is the real plaintiff; all in accord with the decisions of this court as to the character of the rights created by the Federal Act and the time of their inception.

VI.

Differences Between the Federal Employers' Liability Act and Lord Campbell's Act.

The *Woodward* case (23 Wis. 400) was decided in 1868 and the other leading cases antedate the Federal Act many years. When Congress adopted the particular type of statute classifying beneficiaries, with priorities, there was authoritative and well reasoned construction thereof. Counsel admit, page 9, that the judicial construction already placed on a statute by a state court is presumed to have been adopted by Congress with such statute, but counsel argue that this rule should be applied to Lord Campbell's Act. On pages 7 to 9 counsel assert that there can be no difference between the Federal Act and Lord Campbell's Act because this court stated in the *Vreeland* case (227 U. S. 59), that the two statutes were "essentially identical." In the *Vreeland* case this court was not comparing the provisions of the two statutes regarding the rights of beneficiaries. The quotation on page 8 of respondent's brief relates to the question whether the Federal Act gives a new right of action for death or continues the right of action which the injured person had. This appears from a sentence counsel have omitted from their quotation, using asterisks. In this omitted part, the court goes on to say that Lord Campbell's Act has been construed as creating a new cause of action to compensate the family for pecuniary loss resulting from the death and not as continuing

any right of action of deceased for personal injury. Of course in that respect Lord Campbell's Act and the Federal Act (prior to the Amendment of 1910) were essentially identical but their respective provisions regarding beneficiaries are strikingly different, as comparison will demonstrate:

Federal Employers' Liability Act.

"Every common carrier by railroad while engaging in commerce between any of the several states . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce or, in case of the death of such employe, *to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe; and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe*, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment." (Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65; Sec. 51, c. 2, Title 45, "The United States Code," Act of June 30, 1926).

The Federal Employers' Liability Act:

1. Classifies the relatives on the basis of their natural dependence.
2. Does not provide for *division* among the relatives, of the amount *recovered*; is not a statute of distribution.
3. Restricts the right of action to such *preferred* class of beneficiaries, if any, *as survive the deceased*, and excludes the more remote classes.
4. The particular relatives who become sole beneficiaries are determined by the facts in each case *at the time of the death of the employe*.
5. The damages are limited to the pecuniary loss sustained *by the particular beneficiary* who has the right of action; losses of more remote relatives are not included.
6. The statute makes no provision for bringing in remote beneficiaries in case a preferred beneficiary should die while action is pending. If remote beneficiaries acquire no right of action *at the death of the employe* they cannot acquire same *through the death of a preferred beneficiary*.

Lord Campbell's Act.

"Whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof then, and in every such case, the person who would have been liable if death had not ensued *shall be liable to an action for damages*, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

"And it be enacted, *that every such action shall be for the benefit of the wife, husband, parent, and child of the person* whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action *the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties, respectively*, for whom and for whose benefit such action shall be brought; and *the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the jury, by their verdict, shall find and direct.*"

9 and 10 Vict. c. 93; Tiffany Death by Wrongful Act. 2d Edition. 485.

Lord Campbell's Act:

1. Makes no classification of beneficiaries; gives them concurrent rights.
2. Provides for *division* among the beneficiaries of the amount *recovered*; such division to be made *by the jury*, is a statute of *distribution*.
3. Provides an action for *all* beneficiaries, the jury to apportion the damages to the respective parties.
4. The respective rights of the beneficiaries are not determined *until the verdict of the jury*.
5. The damages include *all pecuniary losses* sustained by *all enumerated relatives*.
6. The statute provides for *all* the beneficiaries *collectively* and the death of one has no effect on the rights of any of the others.

VII.

Congress Rejected Specific Provisions and Amendments, Which if Adopted Would Have Made the Federal Act Like Lord Campbell's Act. The Minnesota Court Has Construed the Federal Act as if It Contained Such Rejected Provisions.

It is not accidental that the Federal Act does not contain a provision like Lord Campbell's Act for dividing the judgment among the surviving beneficiaries. The legislative history of the Federal Act shows that the English statute was referred to repeatedly in committee reports and debates; that several amendments were introduced which, if adopted, would have made the recovery distributable.

Counsel make no reply to our Point III that the Supreme Court of Minnesota has construed the Federal Employers' Liability Act in this case as if it contained specific provisions which were proposed in Congress, but rejected. Counsel do not dispute the legislative history of the statute outlined on pages 37 to 45 of our brief; they do not deny that under the authorities the rejection by Congress of specific provisions contained in the bill as originally reported and the rejection of proposed amendments are conclusive that the act should not be so construed as to include such provisions.

VIII.

No Court but the Supreme Court of Minnesota Has Construed a Statute Like the Federal Act as Giving a Right of Action, on the Death of the Beneficiary, to Remote Kin Who Were Excluded When the Cause of Action Accrued.

The court below stands alone on the theory that under statutes like the Federal Act, remote next of kin, who admittedly are excluded when the cause of action accrues and during the life of the beneficiary, may have a right of action on the death of the beneficiary. We have been unable to find any case in which such a statute has been so construed. Counsel for respondent have cited none. They rely on decisions dealing with statutes like Lord Campbell's Act, which plainly provide for *distribution* of the amount recovered among beneficiaries existing at the time of suit.

In *Morris* v. *Spartanburg Ry. G. & E. Co.* 70 S. C. 279, 49 S. E. 854, relied on by the Supreme Court of Minnesota and quoted from on page 13 of respondent's brief, the Supreme Court of South Carolina was construing a state statute quoted in the opinion of the court in part as follows:

> "and in every such action *the jury give such damages*, including exemplary damages, where such wrongful act, neglect or default was the result of recklessness, willfulness, or malice, as they may think *proportioned to the injury resulting from such death to the parties, respectively, for whom and for whose benefit such action shall be brought. The amount so recovered shall be divided among the before mentioned parties in such shares as they would have been entitled to of the deceased had died intestate* and the amount recovered had been personal assets of his or her estate."

The *Morris* suit was brought for the benefit of all the heirs at law of the deceased and the South Carolina court stated, as quoted on page 14 of respondent's brief, that the action was prosecuted "for the benefit of *whoever may be entitled to participate in the distribution of such recovery* as may be had." The Federal Employers' Liability Act contains no provision like the South Carolina statute, or like Lord Campbell's Act, that the amount *recovered* shall be *divided* among the relatives. There is no such distribution under the Federal Act.

In *Garrard* v. *Mahoning Valley Ry. Co.* 100 Ohio State, 212, 126 N. E. 53, relied upon by the Supreme Court of Minnesota and quoted from on page 13 of respondent's brief, the Supreme Court of Ohio was dealing with a statute which it quoted in part as follows:

> "It (the action for death) must be brought in the name of the personal representative of the deceased person and the jury may give such damages as it may think *proportioned to the pecuniary injury resulting from such death, to the persons, respectively, for whose benefit the action was brought.*"

Referring particularly to this language of the statute, the Supreme Court of Ohio held that the right of action was *lodged in the personal representative* for the benefit of the class of beneficiaries *existing at the time the personal representative instituted suit.*

IX

Congress Was Greatly Interested in Who Might Be Rec ompensed for the Death of a Railway Employee

The argument of counsel, page 3, that Congress was not particularly interested in who might be recompensed for the death of a railway employee, utterly disregards the legislative history of the statute. (Petitioner's Brief,

pages 37-45), from which it appears that the most careful consideration was given to the question of who should be entitled to recovery and how the act should be worded in that regard. If the statute had been intended to require payment to someone in every case, as counsel seem to think, Congress would have adopted the so-called penalty type of statute, in force in Massachusetts, Missouri, and some other states, fixing a definite sum to be paid regardless of survivorship, relationship or dependency.

X.

This Case Does Not Involve Any Question of Strict Construction or Liberal Construction.

Counsel argue, page 14, that the statute should be liberally construed, but they do not dispute the authority of *Doe* v. *Considine*, 6 Wall. 458, that where a statute is unambiguous the court will not attempt to qualify it by construction.

This case does not involve any question of strict construction or liberal construction. The act in question creates a new right of action and prescribes the circumstances under which it shall arise. The statutory plan is exclusive. Parties claiming under the statute are confined to its terms and must bring themselves strictly within the statutory requirements necessary to confer the right. The cause of action accrues only for such persons as the statute permits and they alone can recover. There is no question of strict construction about that; it amounts only to enforcing the plain provisions of a statute, or rather requiring those who claim the benefit of the statute to establish that they are entitled to it.

Outside the statute, the sister had no right; having asserted a right under the statute, she must bring herself within its terms.

XI.

This Court Will Not Piece Out the Statute to Give a Right of Action Beyond Its Terms.

Counsel for respondent have conjured up hypothetical cases (page 4) to illustrate what might happen under a statute that does not permit successive recoveries by all the various classes of beneficiaries, in turn. Counsel infer that the construction demanded by the plain language of the Federal Act would be harsh, inequitable and inconsistent with its humane purpose. Of course this court is dealing with the facts of *this* case, not with any imaginary situation. However appealing might be the supposed cases of the invalid wife, infirm parents, etc., for whom counsel express such disinterested anxiety, the court will not piece out the statute to give a right of action beyond the terms of the law. In *Betz v. Kansas City Southern*, 284 S. W. 456, where recovery for the death of a wife was denied because her husband, who was the preferred beneficiary, sustained fatal injuries in the same accident and died three hours afterwards, the Supreme Court of Missouri said that an argument that such construction of the statute would enable the defendant to escape liability, should be directed to the legislature, and in *Clark v. Railroad Company*, 219 Mo. 531, the court said:

> "*In determining the hard case put by counsel, it is well to bear the adage in mind that hard cases make bad law—are the quicksands of law.*"

On its face, the Federal Act does not provide a recovery for each and every relative who might have been de-

pendent upon a deceased employee. The liability created is limited strictly to those relatives who, in common experience, have been primarily dependent upon the wage earner for their support. In the average family the wife and children have first claim on the earnings of the husband and father. The statute provides that if a widow or children survive the employee, the cause of action is for them alone, for the pecuniary loss they have sustained; parents, brothers and sisters are excluded no matter how much they may have relied upon the deceased for support. In such a situation the parents are in no different position if an invalid wife should die of the shock of learning of her husband's death, as suggested by counsel, because the parents get no right of action whether the widow lives or dies. If the employee had no wife or children his parents naturally were in closest relation to him. The statute assumes that in such case the earnings of deceased have been devoted principally to them and the right of action is given for their exclusive benefit, without regard to more remote dependent relatives. The classification adopted by Congress makes the railroad liable only to those who stood in the closest relation to the employee in his lifetime. As the statute creates a single cause of action for the exclusive benefit of those who have been the principal objects of the employee's own efforts, it is not surprising that remote relatives, thus excluded at the time the cause of action accrues, should not have a cause of action of their own if the preferred beneficiary should die. Counsel seem to think that such relatives should have been given greater consideration in case of the death of the preferred beneficiary but the statute does not contemplate *any* recovery for such remote dependents *under any circumstances*.

XII.

The Sister Was Not Dependent, Within the Meaning of the Statute.

There is nothing in the situation of the sister for whom this judgment was rendered which would support any pathetic appeal to the sympathies of the court, if same were proper. She is a strong, mature, able-bodied woman, who supported herself in Chicago both before and after the death of her brother and who, from her own testimony, would have been supporting herself at the time of her brother's death had he not paid her to return home and keep house for him and the aged mother.

Counsel state, page 17, that there is not the slightest foundation in the record for our claim that the sister was not dependent within the meaning of the statute. However, the trial court said that the question of her dependency "*was not free from doubt.*" (Rec., 100.)

Counsel further state on page 17 that in cross-examining the sister we attempted to place her in the attitude of a paid servant. The record showing the relations of the brother and sister is made up principally of her direct examination and the direct testimony of the witness Mary Le Claire (Rec., 62-67) produced by the sister to corroborate her statement that the brother had gone to Chicago and persuaded her to return home with the promise that he would pay her a great deal more money than she could earn in Chicago. (Rec., 63.) The trial court summarized the evidence as follows:

> "In the case at bar it appears that the beneficiary was a sister of the deceased, 33 years of age, and that she had gone from the family home at Otes-

ton, Iowa, to Chicago, where she was employed for a number of years and entirely supporting herself. The deceased brother was a fireman employed by the defendant company, receiving an average wage at the time of his death of $143 per month, and living at the family home at Creston, Iowa, with his mother and sister. Both mother and sister were in poor health and needed care and attention. Deceased then went to Chicago and induced his sister to give up her employment and come home and take care of the household for him and the mother and sister. She did so, living there until the time of the decease of the brother, who was killed in an accident.

She was paid fifteen or twenty dollars a week after her return. Her brother also gave some of his earnings to his mother. She went home and took care of the mother, the son paying for the upkeep of the home, buying the mother's clothing and gave the sister money for her own clothing. The sister of the deceased took care of the mother and the house, did the cooking and ran the house and *what she received was for services rendered.* She handled the finances of the home, paying the grocery bills, and he gave her money in addition to the fifteen or twenty dollars per week. It appears that she was not hired by the day or week nor did she receive any regular amount, *that he gave her for her services whatever he could afford* and whatever was needed, that she went to Iowa to care for her sister and mother, the brother caring for her so she would not be in want and could depend upon him for her upkeep, and that he agreed to provide for her if she came back and stayed at home.

There is also the evidence of another witness that this brother told her to come back and take care of the house and *he would pay her a great deal more than she could earn in Chicago*, in the event of the mother passing out if she would still keep his house she could depend on him for the future." (Rec., 98-9.) (Italics ours.)

At page 18 counsel place great reliance on the sister's

answer to a leading question asked by her own counsel on redirect, that she was *not a servant*. Of course her conclusion in this respect would not be determinative.

The Supreme Court of Minnesota summarized the facts as follows:

> "The evidence showed that the Anderson family lived at Creston, Iowa, and that Ada C. was a member of the family until she became nineteen years of age, when she went to Chicago, where she obtained employment and supported herself for a period of about six years. In the meantime her father died, her mother, with a younger daughter and the son Elmer E. remaining in the old home. The mother's health became impaired and Elmer decided to induce Ada to return and take charge of the household and care for the mother. He went to Chicago in 1916 or 1917 and had a conversation with Ada, heard by a disinterested witness, who testified that he asked Ada to come home and *'take care of the house and he would pay her a great deal more money than she could earn in Chicago*, and in the event of the mother passing out, if she would still keep his home, she could depend on him for the future. * * * After the mother passed away she could still depend on him for her living and that he would look after her future.' Following this conversation Ada gave up her position in Chicago, went home and managed the household and cared for mother for about four years. Soon after her return her sister died and, on November 1, 1920, when Elmer lost his life, he and Ada and their mother constituted the family. From the time of Ada's return until November 1st, Elmer provided for the maintenance of the home and for her support. After his death and the death of her mother, Ada returned to Chicago, where she was earning a livelihood at the time of the trial." (Rec., 107 S., 207 N. W. 186.) (Italics ours.)

Counsel contend, pages 21 to 23, that the question of dependency is foreclosed because of the finding of the

jury, and they rely upon *Seaboard Air Line Ry. Co.* v. *Kenney*, 240 U. S. 489. In that case the question was not raised in the Supreme Court of the state, but in this case it was raised and passed upon by the Supreme Court of Minnesota, the court holding, as a matter of law, "that dependency may exist under the Federal Act although there is no actual necessitous want on the part of the alleged dependent and although it appeared that the sister had given up another occupation to manage the household, at the request of the brother, from whom she received money regularly for her support." (Syllabus by the Court in *Wells-Dickey Trust Co.* v. *C. B. & Q. R. R. Co.* 166 Minn. 79; 207 N. W. 186.)

An adult sister, claiming as a dependent next of kin under the Federal Act, must show actual inability to support herself, that she has been deprived of her means of support and left in want. At all times the sister has been a wage earner. She managed the household and cared for her aged mother pursuant to a definite arrangement with her brother. She was paid from $15 to $20 a week (Rec., 55), paid semi-monthly. (Rec., 56.) Such payments by the brother were contingent upon, and in consideration of, the services rendered by the sister. This arrangement might have been made by or with any competent housekeeper. It was conceded that if she had continued working in Chicago the brother would not have paid her anything. (Rec., 62.) It is not contended that if she had returned to Chicago prior to her brother's death, he would have paid her anything. We do not believe the Federal Act contemplates that able-bodied, adult, self-supporting, collateral relatives of deceased railway employees shall recover damages under such circumstances.

We respectfully submit that the judgment of the Supreme Court of the State of Minnesota should be reversed.

Respectfully submitted,

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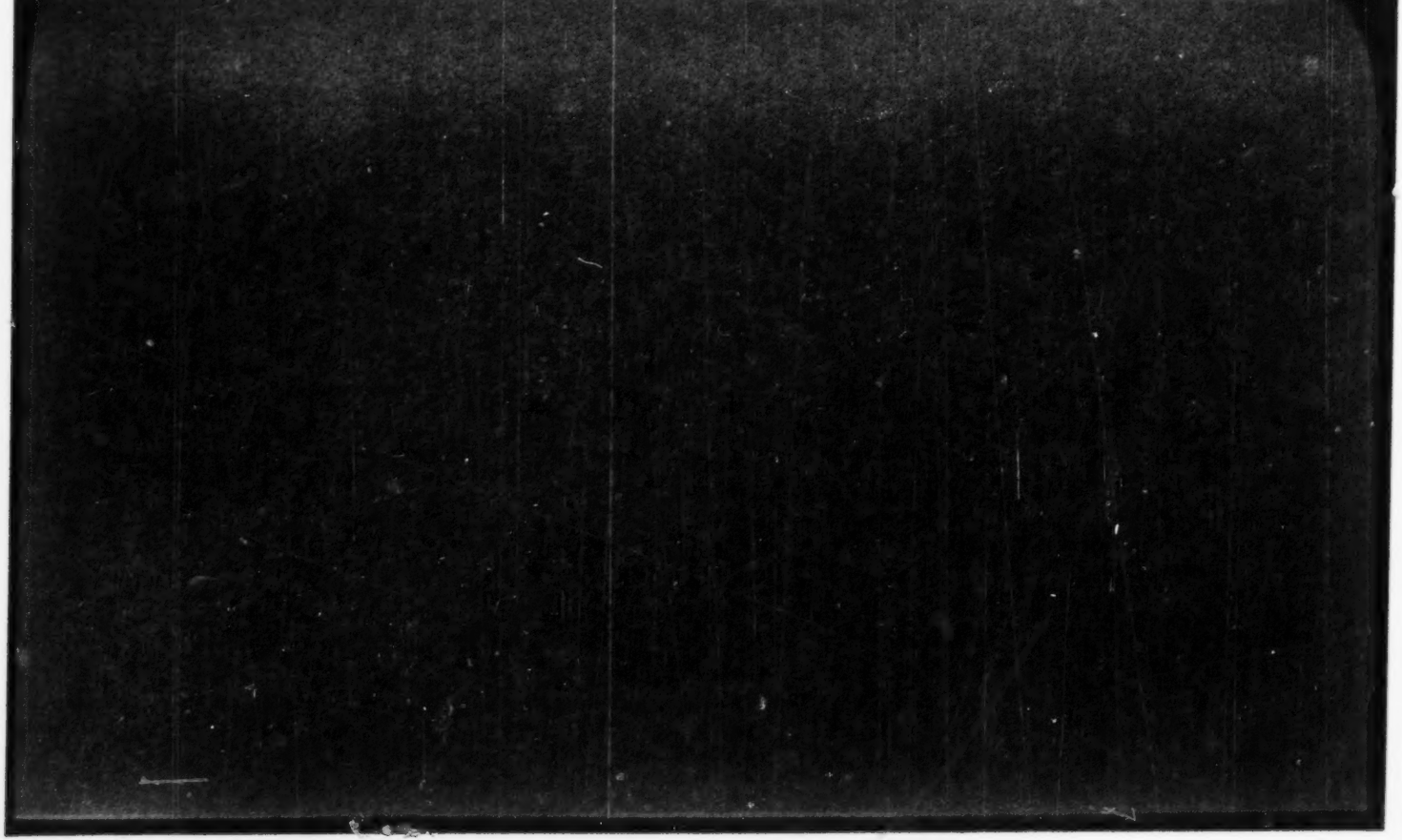
[redacted]



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Supreme Court of the United States

OCTOBER TERM, 1925

No.

[illegible] & Q[illegible] Railroad Company,

Petitioner

v.

[illegible] Department of Treasury of State of [illegible]

[illegible] Revenue Law [illegible] Division,

Respondent

RESPONDENT'S BRIEF AND ARGUMENT IN OPPOSITION TO PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI

By its application for a writ of certiorari herein the petitioner raises but two questions for consideration by this court:

1. Did the Congress by using the words found in the act relating to taxation of real estate [illegible] the property of a municipality [illegible] the State of an employee of the department of [illegible] or [illegible] within any the territorial limits [illegible] the right of [illegible] the [illegible] should immediately

The words used in the act are simple. We quote, "In case of the death of such employee, to his or her personal representative for the benefit of," and then follows a particular enumeration of those who naturally fall into three classes—wife or children coming first, parents second, and those more remote third. There is no declaration that the liability imposed by the act shall vest in anyone, not in terms at least. The language is

> "shall be liable in damages to any persons suffering injury while he is employed, etc., or in case of the death of such employee, to his or her personal representative for the benefit of," followed by an enumeration of the three classes.

the court will say so, but it seems to us, with great deference, that a holding the other way would be more consonant with the entire purpose and spirit of the act, and the antecedent events that are well known which brought about the action on the part of the Congress in the enactment of this law.

Beginning on page [illegible] of its brief, petitioner cites cases and excerpts from opinions of the same, from various state courts of last resort construing death statutes in such states. The statutes of each particular state differ in phraseology from those of the other states and are diverse from each other in various particulars, which would have a material effect in the construction to be given to each of such statutes. With reference to such cases the highest court of each particular state is construing the exact statute, the words expressed in such statute and what the legislature enacting the statute under consideration intended by the use of the words in the statute enacted. How much of said [illegible] cases are of course, [illegible] not know. The statutes [illegible] are [illegible] from each other [illegible] and are diverse from this statute [illegible].

[illegible] Wrongful Death Act [illegible] [illegible] [illegible]

> "This is a narrow interpretation of the act, and would *operate to defeat all liability* unless the injured person should survive long enough to conduct his action to a recovery."

So here the petitioner's construction would operate to defeat all liability unless the particular beneficiary entitled to the recovery as fixed at the instant of death, should survive a sufficient length of time to permit the personal representative to prosecute an action to a recovery.

As to petitioner's contention that the Congress purposely intended to make the act of vital particulars diverse from Lord Campbell's act, the language of Mr. Justice Luther clearly and concisely states an exactly opposite conclusion, to quote his exact words,

> "The statute giving an action for the benefit of certain relatives . . . [of the deceased] is essentially unlike that of Lord Campbell's act. . . . [The latter] is an action for the benefit of the estate of the deceased person. . . . The distinguishing features of Lord Campbell's Act are identical with those of our statute. . . ."

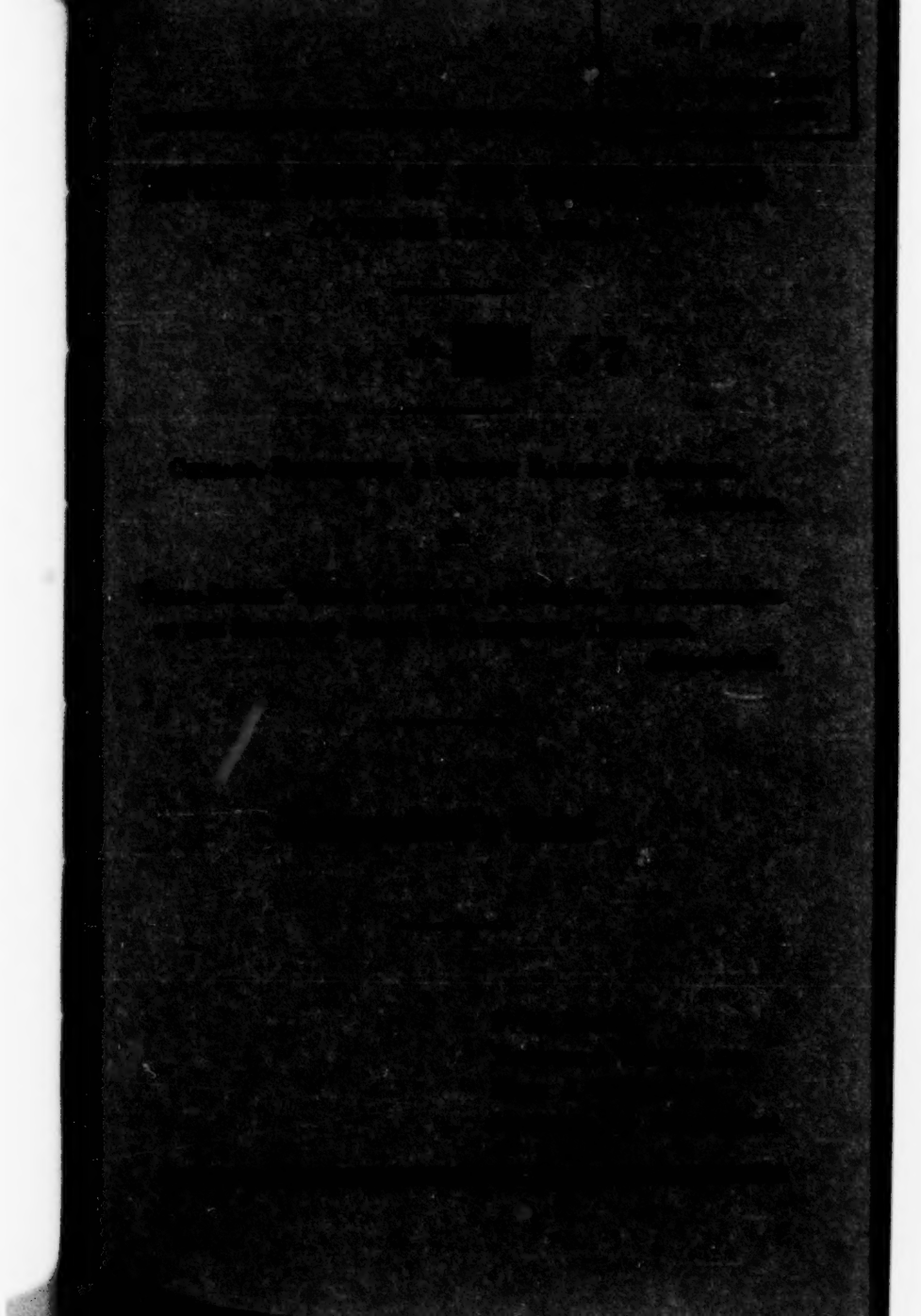
> [ving be carry on the action for the benefit of whoever may be entitled to participate in the distribution of such recovery as may be had."

From an examination of the opinions in the cases cited by petitioner in its argument, from the states of Tennessee, Wisconsin and Indiana, it will be noted that the courts of those states in construing their respective statutes laid much stress upon the old rule so frequently declared and followed by state courts to the effect that where a statute is in derogation of the common law, the same is to be strictly construed and to not be given extended [illegible] the evident purpose of the legislature in the enactment of such statute.

[illegible]

[illegible]

[illegible]



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No. 355.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
Petitioner,

vs.

WELLS-DICKEY TRUST COMPANY, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF EUMER E. ANDERSON, DECEASED,
Respondent.

Respondent's Brief

This appeal raises but two questions for consideration by this court:

1. Did the Congress by using the words found in the act relating to beneficiaries, intend that upon the happening of a wrongful act causing the death of an employee, if the deceased left surviving some one coming within, say the first class of beneficiaries enumerated, the right of being compensated by the wrongdoer should immediately vest, not in a personal representative, but in the person of the one thereby entitled to the benefits of a recovery so that, as in this case, if the one in whom such right has

vested, dies before compensation can be obtained of the wrongdoer, the latter is thereby relieved from liability to respond in damages for the wrong done, although there be still living some one or more within one of the other classes named who have suffered deprivation and loss of pecuniary benefits as the consequence of the wrong complained of, and

2. Does the evidence upon the record show a mere contract of employment between plaintiff's intestate and his sister, or does it show that the sister as a member of the family at the special instance and request of the brother deceased, was dependent upon him while she remained a member of the family, and because of such dependency and expectation of pecuniary benefit from the brother while living is therefore entitled to recover under the terms of the federal act?

We shall first discuss proposition No. 1 as above set forth. It seems to us to be a fair statement of the first claim made by petitioner. Whether or not such be the proper construction of the act is, of course, for this court to say. There are no particular rules of law with which we are familiar that can be of much aid in deciding the question. If it be claimed that the opinions of certain state courts dealing with death statutes are of value, we apprehend that such claim is erroneous, because all of such statutes are diverse in vital particulars from each other, and also from the act here in question.

The words used in the act are simple. We quote, "In case of the death of such employee, to his or her personal representative for the benefit of," and then follows a particular enumeration of those who naturally fall into three classes—wife or children coming first, parents second, and those more remote third. There is no declaration that the

liability imposed by the act shall vest in anyone, not in terms at least. The language is:

> "shall be liable in damages to any persons suffering injury while he is employed, etc., or in case of the death of such employee, to his or her personal representative for the benefit of,"

followed by an enumeration of the three classes.

If there be any vesting of the liability declared, it would seem to have been the purpose of the Congress that such vesting should be in the personal representative as a trustee. Any recovery, however, to be for the benefit of and go to the beneficiaries named in the order stated in the act.

The primary purpose of the Congress as gathered from the opinions by this court may aid somewhat in reaching a right result. That purpose seems to have been directed to the master or employer conducting and carrying on a business inherently more or less dangerous and that the thought of the Congress was directed to that fact rather than to those declared to be beneficiaries and who might be pecuniarily recompensed whenever a violation of the act should create a liability in favor of the designated beneficiaries because of the wrongful killing of an employee. The purpose seems to have been that by declaring civil liability in damages against the master, the result would be that the master would exercise a greater degree of care in the carrying on of his business, and that such greater degree of care would more certainly promote the safety of employees engaged in such hazardous work and also the traveling public using the facilities of the carrier in being transported in their person or property from one section of the country to another.

If petitioner's contention be valid then it is evident that this singular situation would arise. If an act of negli-

gence occurs on the part of the carrier and a human life is terminated, and, as in this case, the one killed has an invalid mother and a dependent sister, each an object of affectionate care to the son and brother killed, and the invalid mother survives the son by an appreciable moment of time, and then dies before the pecuniary loss suffered can be recovered, the wrongdoer by such death is instantly absolved from liability to recompense anyone for the wrongful death, and the sister still living and who has clearly been deprived of a reasonable certainty of pecuniary aid and benefit, cannot recover although admittedly the brother from whom she was receiving such benefits was killed through the negligence of the employer.

Suppose an employee, killed by the admitted negligence of the carrier, leaves an invalid wife and an aged and dependent father or mother or both. The shock of the killing of the husband causes the almost instant death of the invalid wife, and before any liability is declared against the wrongdoer, but the dependent father and mother or one of them still survives. The invalid wife suffers no loss because mercifully taken beyond the need of recompense by the wrongdoer. Having survived the husband by a few moments of time, the right created by the act upon the wrongful killing of the husband immediately vested in her and at once terminated by her demise and is gone, while the dependent parents live on for years, but can enforce no recovery against the wrongdoer because the right created by the act had vested in the person of the invalid wife to be immediately extinguished by her death, and the wrongdoer goes scot free.

If such be the proper construction of the act, of course, the court will say so, but it seems to us, with great deference, that a holding the other way would be more con-

sonant with the entire purpose and spirit of the act, and the antecedent events that are well known which brought about the action on the part of the Congress in the enactment of this law.

Petitioner at the top of page 15 of its brief states:

> "A new cause of action in favor of the sister could not arise by the death of the mother."

Obviously this is true, but why affirm that which no one denies?

Again, on page 16 of its brief, petitioner states:

> "The judgment in this case is on a different cause of action from that which arose at the death of the employee."

This we deny. In this case there is involved but one primary right so far as the question of legal liability is concerned. At the beginning this primary right was possessed by Mr. Anderson, and it imposed upon the petitioner a corresponding duty to exercise towards Mr. Anderson ordinary care in its dealings with him so that he would not be exposed to injury or death. The petitioner admittedly violated this primary duty and such violation resulted in negligence which caused the death of Mr. Anderson. At common law Mr. Anderson's death would have ended the matter. The Congress, however, under its constitutional power saw fit to change the rule of the common law and to provide that in case of death the wrongdoer should be liable in damages to certain enumerated beneficiaries suffering deprivation and loss as a result of the petitioner's wrongful act. There is only one *delict* involved here, the negligence of the defendant which resulted in the death of Mr. Anderson, and no matter for whose benefit an action might be prosecuted to recover for such wrong the facts establishing the *delict*, if admitted or proved, would

be identically the same.

It is true that the amount of damage to which petitioner might be required to respond because of its negligent act, might vary because of the different relation towards Mr. Anderson of the various persons designated in the statute as possible beneficiaries and the proof to establish a right of recovery as to each class of enumerated beneficiaries would vary. The testimony as to the amount which a widow or children might be entitled to would be different from the testimony offered on behalf of parents, or on behalf of more remote beneficiaries, but the wrong complained of, and in this case admitted, would be identically the same wrong no matter who might be found entitled to receive the benefit of any recovery against petitioner on account of its admitted wrong.

We respectfully submit that the cases cited by petitioner on pages 16 and 17 of its brief, which it claims have a bearing upon this question, are not in conflict with the contention here made by us. It is obvious that as to beneficiaries the personal representative is only a trustee and it is equally obvious that as to all proper steps taken by such personal representative to recover for the wrong done all beneficiaries who might be interested in receiving any sum obtained by such trustee, would be bound by each act rightly performed by such trustee in an effort to obtain for those entitled to receive it, damages against the wrong doer.

Beginning on page 19 of its brief, and continuing through the following pages down to and including page 30, the petitioner cites to the attention of the court numerous cases, most of which involve the consideration and interpretation of statutes of different states involving somewhat similar questions. If this court adopts the views as

expressed in the various cases so cited to the court as applicable to a consideration of the proper construction of the federal act here involved, then of course in that case, we assume that this judgment will be held to be erroneous.

The statutes of each particular state differ in phraseology from those of the other states and are diverse from each other in various particulars, which would have a bearing upon the construction to be given to each of such statutes. With reference to such cases the highest court of each particular state in construing its own statute, has merely expressed its own notions of what the legislature enacting the statute under consideration meant by the use of the words in the statute contained. How much of aid, if any, these opinions may be to this court in declaring the purpose of the Congress, we, of course, do not know. The statutes construed are as diverse from each other in some vital particulars as all are diverse from the federal act.

Beginning on page 46 of its brief, petitioner introduces an argument for the purpose of attempting to demonstrate to this court that the Congress in adopting the federal act did not intend to adopt the British statute known as "Lord Campbell's Act," and the petitioner asserts that the act differs from Lord Campbell's act, and the statutes of some of the states, and cases are cited to the attention of the court from which petitioner seeks to deduce the inference that the Congress purposely changed the phraseology of the act in order to indicate a departure from the construction which the English courts had given to Lord Campbell's act.

This court does not seem to agree with petitioner as to the facts or conclusions drawn by it as to what the Con-

gress had intended by the words employed. A careful reading of the opinion delivered by Mr. Justice Lurton in the leading case of *Vreeland vs. Michigan Central R. R. Co.*, 227 U. S. 59, seems to impel a conclusion the exact opposite of that drawn by petitioner.

In the first place as to whether the act should be narrowly or liberally construed in furtherance of effectuating its spirit and purpose, this court decided in favor of a liberal construction.

At the beginning of the opinion Mr. Justice Lurton speaks of the contention made by the railroad company as to the Congressional purpose, and says of such contention:

> "This is a narrow interpretation of the act, and would *operate to defeat all liability* unless the injured person should survive long enough to conduct his action to a recovery."

So here the petitioner's construction would operate to defeat all liability unless the particular beneficiary entitled to the recovery as fixed at the instant of death, should survive a sufficient length of time to permit the personal representative to prosecute an action to a recovery.

As to petitioner's contention that the Congress purposely intended to make the act in vital particulars diverse from Lord Campbell's act, the language of Mr. Justice Lurton clearly and decisively states an exactly opposite conclusion, for, to quote his exact words,

> "The statute in giving an action for the benefit of certain members of the family of the decedent is essentially *identical* with the first act which ever provided for a cause of action arising out of the death of a human being—that of 9 and 10 *Victoria*, page 93, known as Lord Campbell's Act. * * * The distinguishing features of that act (Lord Campbell's Act) are identical with the act of Congress of 1908 before its

amendment; (an addition not involving the question here discussed). First, it is grounded upon the original wrongful injury of the person; second, it is for the exclusive benefit of certain specified relatives; third, the damages are such as flow from the deprivation of the pecuniary benefit which the beneficiaries might have reasonably received if the deceased had not died from his injuries. The pecuniary loss is not dependent upon any legal liability of the injured person to the beneficiary. That is not the sole test. There must, however, appear some reasonable expectation of pecuniary assistance or support of which they have been deprived."

Having now shown conclusively by the foregoing, that petitioner is wrong in one of its deductions, it is fair to assume that the remainder are equally faulty and erroneous.

On page 51 of its brief, petitioner urges in effect that it was the intent of the Congress to adopt the type of statute classifying beneficiaries with priorities, which had been in force in many states for a long time prior to the adoption of the federal act, and that therefore, under a familiar rule it must be presumed that the construction of such statutes by the highest courts of the several states where such statutes were in force, is presumed to have intended to adopt such construction as applicable to the federal act.

We submit, that if the rule invoked has any application in the consideration of this case, such rule applies, not to the statutes of the several states dealing with a somewhat similar subject, but that such rule, if applicable here, would, under the decision of this court in the Vreeland case, apply to Lord Campbell's act, and the construction of such act by the English courts prior to the adoption by Congress of the Federal Employers' Liability Act. We

submit that it would be presumed that Congress was familiar with the construction placed upon Lord Campbell's act by the English courts, and that it was expected that such construction would be adopted and applied by this court in construing the various provisions of the federal act, and we submit that this expectation was carried out by this court in its opinion in the Vreeland case.

Mr. Roberts, in his work *Federal Liabilities of Carriers*, Vol. 2, Sec. 628, sets forth what he deems to be the true construction, as we understand it, of the federal act. He cites the Vreeland case, which he says is the leading case upon the question of the measure of damages in cases of death under the Federal Employers' Liability Act, and says that in the Vreeland Case

> "the Supreme Court promulgated some general rule as to the measure of damages, and cited with approval cases from various courts in which it was held that the rules were properly announced by the courts in those cases. In view of the conflicting rulings of the courts of the several states as to the measure of damages under death statutes, due no doubt to the different language of the statutes of the several states, and in view of the further fact that such statutes do not apply and are superseded by the federal act as to interstate employees, these cases approvingly cited by the United States Supreme Court on this question, are of value to the practitioner and the courts in ascertaining the proper rules and standards in determining the measure of damages to the various beneficiaries named in the federal act."

Mr. Roberts then takes up and considers the cases cited by this court in the Vreeland case, and deduces, what he regards, as the proper rule to be applied in the face of the decision by this court in the Vreeland case.

On page 8 of its petition, the petitioner refers to the case of *Garrard vs. Hocking Valley R. Co.*, 100 Ohio

St. 212, 126 N. E. 53, for the purpose of calling attention to the rule therein announced as follows:

> "By force of the statute the right to enforce the liability is not placed in the beneficiary."

This quotation is made by petitioner for the purpose of showing that the Minnesota court followed the rule as announced by the Ohio court, and that the rule conflicts with a principle announced by this court in the recent cas of *Reading Co. vs. Koons, admr.*, decided April 12, 1926, and *C. R. I. & P. Ry Co. vs. Schendel, admr.*, Oct. term, 1925.

We fail to see any conflict or inconsistency between the rule announced by the Ohio court and approved by the Minnesota court and the holding of this court in the cases just named. The principle this court considered and applied in the *Schendel case* was one of estoppel or *res adjudicata*. The holding was, as we read the opinion, that for the purpose of estoppel a beneficiary would be considered as represented in court in all proper steps taken, by the presence of the personal representative. In this case the mother while living and entitled to the fruits of the litigation, would be bound as to all legal steps taken by the personal representative or against the personal representative, and estopped from avoiding the consequences flowing therefrom. After her death the sister thereby becoming entitled to the fruits of the suit, would likewise be bound by all legitimate acts taken in the prosecution of the cause and estopped from asserting to the contrary. We wholly fail to grasp, however, how this admitted result can have any bearing one way or the other, either to sustain or defeat the petitioner's contention herein. While the opinion in the *Koons case* related to the statute of limitations and is not in point here as

we read the opinion.

Petitioner lays much stress upon the words used by the Congress in its enumeration of the different classes of beneficiaries, for after designating wife or wife and children as constituting the first class, the words "if none" are inserted before the inclusion of father and mother or either as composing the second class, and again before designating the more remote third class.

Here again we fail to grasp the vital significance which petitioner seeks to attach to these words "if none." Does their use necessarily imply that they indicate beyond doubt the purpose that they should be operative instantly upon the death of an employee negligently killed in violation of the act, and that if it appears upon such death that there be those within the first class enumerated the right immediately attached as to those in such first class, and although there be living beneficiaries in the other classes who suffer loss because of the death of the injured employee, that such other beneficiaries are at once foreclosed under all circumstances from any right of recovery although those who are shown to be in the class which would be entitled to the benefits of any recovery, if the wrong be established by the personal representative in a suit, pass away before a recovery can be had

By the very terms of the act if there be those in being at the instant of death who qualify as beneficiaries, but some of whom would constitute the first, some the second, and others the third class, and it appears that each member of the three classes has by the death been deprived of a reasonable expectation of pecuniary benefits by reason of the death, then each of the beneficiaries although placed in different classes by the terms of the act, have nevertheless each suffered a loss as the result of the wrongful act.

The Congress could have provided that in such case the recovery should be divided between the various classes according to the amount of probable loss suffered by each respectively. It saw fit, however, to provide that although some one in each class may have suffered pecuniary loss as a consequence of the wrongful act causing death, yet if there were widow or children, or both, they should be the favored ones, and be entitled to the entire recovery to the absolute exclusion of all those standing in the classes more remote as fixed by the law.

In this connection we desire to refer again to the case of *Garrard vs. Mahoning R. Co., supra*, and call particular attention to the language of the court in that case dealing with this specific subject, for to us it seems reasonable and logical:

> "We think that our statute does not vest the cause of action in any particular class existing at that time, but that the cause of action or the right to enforce liability, is distinctly vested in the personal representative of the deceased person in behalf of the class existing when the right is enforced by suit instituted by such representative."

And, also, to particular language found in the opinion in the case of *Morris vs. Spartanburg, etc., R. Co.*, 70 S. C. 279, 49 S. E. 854. The reasoning of the South Carolina court seems to us to be logical and in entire harmony with the spirit and purpose of such legislation. We quote as follows:

> "We think it would be too narrow a construction of the statute to hold that an action thereunder could abate as long as any beneficiary, person or class named in the statute existed. In this case, while it is true that the father would have been sole beneficiary in the event of his being alive at the time of recovery of damages, still the statute had other beneficiaries in contemplation in the event of his death.

> The brothers and sisters of the deceased named in the complaint are his heirs-at-law, and since they fall within the class of beneficiaries, while the action is still pending, the action should not abate for want of a statutory beneficiary. Under the statute, the action must be prosecuted in the name of deceased's administrator, and he is living to carry on the action for the benefit of whoever may be entitled to participate in the distribution of such recovery as may be had."

From an examination of the opinions in the cases cited by petitioner in its argument, from the states of Tennessee, Wisconsin and Indiana, it will be noted that the courts of those states in construing their respective statutes laid much stress upon the old rule so frequently declared and enforced by state courts to the effect that where a statute is in derogation of the common law, the same is to be strictly construed and never by any means extended beyond the clearly expressed purpose of the legislature in the enactment of such statute.

As we read the decisions of federal courts, the Federal Employers' Liability Act has not been subjected to the rule of strict construction, but on the contrary has been held by many federal courts to be subject to a rule of liberal construction in furtherance of the remedial purposes evidently in the mind of the Congress by the adoption of the law.

While we are not aware that this court has in terms applied the rule of liberal construction to this act, we submit that it has applied such rule to the safety appliance acts and surely the Employers' Liability Act should be construed in the same manner and in the same light and from the same viewpoint as the safety appliance acts.

Thus in *Johnson v. So. Pac. R. Co.*, 196 U. S. 1, this court expressly held that the safety appliance act there

involved was remedial in character and should be accorded a fair construction to accomplish the results intended.

So with reference to this act (Federal Employers' Liability Act) it has also been held by lower federal courts, for instance, *St. L., etc., R. Co. vs. Conley*, 187 Fed. 949, *Behrens vs. I. C. R. R. Co.*, 192 Fed. 581, as well as by some state courts that the federal act being remedial in its purposes, should be liberally construed in furtherance of the objects and purposes which it was passed to conserve.

This is the view taken by the Supreme Court of Minnesota in the disposition of this case, and to us seems a fair and just construction. In the opinion of the Minnesota court near the close as found on page 29 of the record herein, speaking of the Minnesota law which is practically in terms identical with the federal act, the court said:

> "If our statute were to be construed now we would hold that the liability of the employer continues from class to class of beneficiaries upon a preceding class becoming non existent through the death of its members after the death of the employee. The amount of damages recoverable may change, but the liability continues. Without a federal holding we construe the federal act as we would construe our railway act."

As pointed out by the opinion of the Minnesota court, in the above excerpt, the amount of the damages to be recovered upon a change of beneficiaries from a higher to a lower class would change, but this change would be to the advantage of the one guilty of the wrongful act causing death. It certainly requires no argument to show that those embraced in the first class, i. e., wife or children or both, would in almost every conceivable case be awarded, and their relation to the deceased would sustain, much larger damages than could be sustained in an award to

a father or mother, or both, and this would more certainly be true as between those in the first class and any possible beneficiaries named in the third class. This would also be equally true in almost every conceivable case as between father or mother, or both, and more remote beneficiaries such as brother or sister, or both, and would be certain to be much less to all those named in the third class, but who might be able to show that by the death they were deprived of a reasonable expectancy of pecuniary benefit to have accrued to them if the life involved had not been wrongly terminated.

We respectfully but earnestly submit that the construction given to the federal act by the Supreme Court of Minnesota is entirely consistent with the spirit and purpose of these remedial statutes passed by the Congress for the avowed purpose of greater protection to the lives of men engaged in the hazardous work incident to the carrying on of commerce by steam railroad, and for the greater protection of the public that so extensively uses such facilities in the transaction of such a large proportion of the business affairs of the nation, and that the result reached by the Supreme Court of Minnesota in its disposition of this case was correct and should stand.

The petitioner at the trial admitted that its negligence resulted in the death of Mr. Anderson. At the time of such death there were two beneficiaries coming within the terms of the act, the mother coming within the second class named, and the sister within the third class. In the face of the admitted fact of negligence and in the light of the purpose sought to be attained by the Congress in adopting this law, why should the circumstance that the beneficiary in the second class deceased before a recovery could be had, deprive the other beneficiary of a recovery

for the wrong done?

We are wholly unable to see how, if the recovery is allowed to stand, that any wrong is done to the petitioner, for it is, we think, obvious that if the mother had survived a sufficient length of time, that undoubtedly in the face of petitioner's admitted negligence, a recovery in her behalf would have been obtained, and that such recovery would very largely have exceeded in amount the sum awarded by the jury to the sister in this case.

On page 53 of its brief, petitioner asserts—

> "The evidence did not establish dependency essential to a cause of action for the benefit of a sister under the federal act."

With reference to this contention made by the petitioner, we submit that the same is wholly without merit and that a casual reading of the record shows that there is not contained therein anything which furnishes the slightest foundation for the oft reiterated statement of petitioner that the sister who is to receive the award herein if the result so far is sustained, was a paid servant in the home of the deceased brother, which was equally the home of the sister, and therefore not a beneficiary within the spirit and meaning of the federal act.

It is true that the counsel for the petitioner who tried the cause in the District Court sought upon cross examination to place the sister in the attitude of a paid servant. On pages 60 and 61 of the record will be found the testimony bearing upon this particular question. Near the bottom of page 60, and continuing over onto page 61, occurred the following:

> "Q. So his giving you amounts of money depended on what you needed for the house?
>
> A. No, what he gave me was to help me along. I couldn't stay there for nothing, you know, and I had

to have a little spending money for myself and my clothes, and a man don't understand that. So he agreed to give me enough for my clothing and spending money, etc. We worked together in a family budget and everything went together. If I wanted to buy anything for my mother in the line of furniture, if I had any extra money I would put it in. We worked together as a family.

Q. And in return for this money you rendered your services and took care of the household?

A. I acted as the manager of the household.

Q. You rendered your personal services?

A. Yes, sir, I rendered my services, but I wasn't hired by the day or week.

Q. I understand, there was no set sum of money; he gave you for your services whatever he felt he could afford to give and whatever you needed.

A. Yes, sir.

Re-direct Examination.

Q. Do you mean, Miss Anderson—let us get this so the jury will understand it—do you mean that the understanding between your brother and yourself was that you were to work there in the home as a servant for a salary?

A. Positively no, I was not a servant."

The foregoing seems to be absolutely conclusive, and shows the entire lack of any merit in the second contention made by the petitioner to the effect that the sister was not shown to be a beneficiary within the meaning and terms of the federal act.

There is involved here possibly the question as to just the sense in which the Congress used the word "dependent." Several of the state courts have passed upon the question and have construed the act as meaning that the dependent under the circumstances disclosed was at the time of receiving the contribution dependent upon such contribution for shelter, food and clothing, although such

dependent if deprived of such contribution would not necessarily become a public charge, but could by diligent labor earn sufficient to meet such requirements.

In this sense, of course, the sister was clearly dependent upon her brother at the time of his death. She had left her position at his request and returned to the home to assist in caring for the invalid mother and invalid sister, and while so doing and not possessing independent means and not earning anything from other sources, it is perfectly clear that the sister was under those circumstances while in the household maintained by the brother for the benefit of all, dependent upon his contributions both for her food, clothing and the upkeep of the house.

In the opinion of the Supreme Court of Minnesota upon the second appeal in this case, found in the record beginning at page 106 and continuing to page 111, will be found the reasoning of the Minnesota court and an extensive citation of authorities covering the question of dependency under the federal act.

We further contend that this contention of the petitioner is foreclosed by the opinion of this court in the Vreeland case. Mr. Justice Lurton in the opinion following the excerpt heretofore brought to the attention of the court, used this further language, which we submit has application to this contention of the petitioner:

> "Compensation for such loss manifestly does not include damages by way of recompense for grief or wounded feelings (citing cases). The word 'pecuniary' did not appear in Lord Campbell's act, nor does it appear in our act of 1908. But the former act and all those which follow it have been continuously interpreted as providing only for compensation for pecuniary loss or damage.
>
> . . . . . .
>
> No hard or fast rule by which pecuniary damages may in all cases be measured is possible. In *Lett vs.*

St. Lawrence & O. R. Co., cited above, it was said in the opinion of Patterson, J. A., after a review of all the English cases construing the act of Lord Campbell—

> "That there is through them all the same principles of construction applied to the statute. Each fresh state of facts as it arose was dealt with, and furnished a further illustration of the working of the act. The party claiming was held to be entitled or not to be entitled, the scale of compensation acted upon by the jury was approved or disapproved, in view of the immediate circumstances; but in no case has it been attempted to decide by anticipation what are the limits beyond which the benefit of the statute cannot be claimed."

The learned judge then quotes approvingly the following rule from Tiffany, *Death by Wrongful Act*, sections 158 160 162, and says:

> "The rule for the measurement of damages must differ according to the relation between the parties plaintiff and the decedent 'according as the action is brought for the benefit of husband, wife, minor child or parent of minor child, for the loss of services or support to which the beneficiary was legally entitled, *or is brought for the benefit of a person whose damages consist only in the loss of a prospective benefit to which he was not legally entitled.*'" (All italics ours.)

To us this reasoning of the learned justice seems to be apt, persuasive and conclusive upon the question and the construction contended for here by the appellant, for if such were not the case, and those in the third class under the federal act must necessarily be dependent in the sense that if deprived of the support taken away by the wrongful act, the one so supported would become a public charge or an object of charity, why would Mr. Justice Lurton say "The pecuniary loss is not dependent upon any legal liability of the injured person to the beneficiary

That is not the sole test. There must, however, appear some reasonable expectation of pecuniary assistance or support of which they have been deprived," or if the contention of the appellant as to the proper meaning of the word "dependent" is correct, why would Mr. Justice Lurton say in approving the rule from *Tiffany, Death by Wrongful Act*, "*Or is brought for the benefit of a person whose damages consist only in the loss of a prospective benefit to which he was not legally entitled.*" (All italics ours.) Strange language, it would seem to us, if the distinction which the appellant seeks to make is a valid one, and those enumerated in the third class by the federal act could only recover by showing a total inability to provide for themselves and the certainty of becoming public charges or objects of charity in case a recovery were denied.

We further urge that this particular question has been decided adversely to the petitioner's contention as the result of the findings of the jury herein. The cause was submitted to the jury under proper instructions by the trial judge, and to his statement of the law petitioner took no exception. On page 50 of the printed record herein, beginning with folio 150, the trial judge instructed the jury upon this subject as follows:

> "With that very brief statement of the facts we will turn to the law that applies to the matter of the recovery of damages. It is the law that the damages awarded in a case of this kind must be solely by way of compensation for pecuniary loss. No compensation may be allowed for wounded feelings or for loss of companionship and comfort of the deceased; or, as otherwise stated, the damages recoverable are limited to such loss as results because the sister has been deprived of a reasonable expectation of pecuniary benefit by the wrongful death of the brother, the damages being limited strictly to the financial loss sustained.

> The true test is, as to the amount of recovery, if any recovery is had, what, in view of all the facts and circumstances in evidence, was the probale pecuniary interest of the sister in the continuance of the life of the deceased."

We respectfully submit that upon this question of the conclusiveness of the verdict as against petitioner's assertoin that the sister was a mere hired servant and not a beneficiary within the meaning of the act, the decision rendered by this court in the case of *Seaboard Air Line Ry. Co. vs. Kenney*, 240 U. S. 489, seems to us very persuasive and final.

In that case it appeared that one Capehart, a minor, was employed by the defendant company as a switchman; that he was an illegitimate child; that his mother afterward married and had three children as the fruit of the marriage who were all under age at the time of her death, which occurred some time prior to the death of Capehart; that the latter was killed, it was claimed, by the negligence of the defendant railroad company and Kenney as representative brought an action against the railroad company for the benefit of the three children who were half sisters and half brothers of the deceased. A recovery was had in the sum of $8000.00 upon which judgment was entered, which judgment was affirmed by the Supreme Court of North Carolina, and the cause was then taken by writ of error to this court.

In this court three principal contentions were made, only one of which is material here. It was claimed that there was no proof offered upon the trial in the court of first instance to show a dependent relation between the children spoken of and the deceased half brother. As we read the record it does not appear that these three minor

children were wholly dependent or wholly supported by contributions made for their support by Capehart during the period intervening between the death of their mother and his death as the result of the negligent injury. All that appeared was that he made some contribution to the support of these three children of his natural mother. In disposing of this objection Mr. Chief Justice White, who delivered the opinion, said:

> "Insofar as it is suggested that there was no proof tending to show a dependent relation between the next of kin who were recognized and the deceased, so as to justify a recovery under the statute, it suffices to say that it was expressly foreclosed by the finding of the jury, sanctioned by the trial court, and was not questioned in the court below (the Supreme Court of North Carolina), and at all events involves but a controversy as to the tendencies of all the proof, foreclosed by the action of both courts which we would not reverse without a clear conviction of error, which, after an examination of the record on the subject, we do not entertain."

See also *Richlieu vs. C. P. Ry. Co.* (Neb.), 149 N. W. R. 772; *Brackshaw vs. Chi. R. I. & P. R. Co.* (Ia.), 155 N. W. R. 273.

There are cases to be found in the higher courts of some of the states construing state compensation acts where such courts have held that under the peculiar terms of their statutes the word "dependent" should be considered in the sense as contended for by the appellant herein. While we do not quarrel with such construction so placed upon such statutes by the courts of last resort when called upon to construe them, we nevertheless respectfully submit that they should have no weight in the determination of this question as applied to the act of Congress. The purpose of this act repeatedly declared was not to enable

common carriers to escape liability for negligence resulting in the injury or death of employees, but for the very purpose of enforcing upon such carriers greater care in the selection of their appliances and their employees who were to operate the same, and for the express purpose of giving to the classes of persons designated full and fair compensation in all cases where the carrier was found guilty of having violated the law enacted for the safety not only of employees but of the public. And this view we think is strengthened by the fact that while most courts in construing statutes passed in derogation of the common law hold that such statutes are to be strictly construed, such is not the rule with respect to the act of Congress, for this court has repeatedly ruled that it is a remedial statute and to be fairly construed in the furtherance of the purpose and object had in view by the Congress in the passing of the various laws such as the Federal Employers' Liability Act and the Federal Safety Appliance Acts.

It appears to us that the foregoing sufficiently meets and refutes the contention of the appellant; that the proof on the record is abundant to sustain the judgment; that such judgment is strictly in conformity with the letter and spirit of the act of Congress; is therefore right and should be affirmed.

All of which is respectfully submitted.

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Attorneys for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 57.—October Term, 1927.

Chicago, Burlington & Quincy R. R. Co., Petitioner, vs. Wells Dickey Trust Co., Special Administrator.	On Certiorari to the Supreme Court of the State of Minnesota.

[November 21, 1927.]

Mr. Justice Brandeis delivered the opinion of the Court.

Anderson was killed instantly while employed in interstate commerce by the Chicago, Burlington & Quincy Railroad. Wells-Dickey Trust Company was appointed special administrator and brought, in a state court of Minnesota, this action under the Federal Employers' Liability Act, April 22, 1908, c. 149, § 1, 35 Stat. 65; United States Code, Title 45, c. 2, § 51, for the benefit of a sister alleged to be dependent. Anderson had not left surviving widow, child, or father. His mother had survived him, but died before the administrator was appointed. No action was brought on her behalf. After proceedings which it is unnecessary to detail, the Railroad moved for a directed verdict, upon the ground that, since the mother had survived, the cause of action vested in her; and that when she died, the cause of action died with her. The direction was denied; the plaintiff got a verdict; and the judgment for the plaintiff entered thereon was affirmed by the highest court of the State. 159 Minn. 417; 166 Minn. 79; 166 Minn. 83. This Court granted a writ of certiorari. 271 U. S. 657.

Whether the action lies depends upon the construction to be given § 1 of the Federal Employers' Liability Act and presents a novel question. That section provides:

"Every common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if

none, then of such employee's parents, and, if none, then of the next of kin dependent upon such employee."

For an injury resulting in death the Act gives two distinct causes of action. One is to compensate the injured person for his loss and suffering while he lives. Under the original Act, that cause of action did not survive. *Michigan Central R. R. Co. v. Vreeland*, 227 U. S. 59, 67-68. Now, under the amendment added as § 9 by Act of April 5, 1910, c. 143, 36 Stat. 291, it survives to the personal representative. *St. Louis, Iron Mountain & Southern Ry. Co. v. Craft*, 237 U. S. 648. The second cause of action is to compensate persons other than the injured employee for pecuniary loss suffered by them through the employee's death. While the suit thereon must be brought by the personal representative of the employee, he sues as trustee for the person or persons on whose behalf the Act authorizes recovery. The question is whether the sister, being, but for the short survival of the mother, "next of kin, dependent upon such employee" is, under the circumstances, entitled to compensation.

The language of § 1 makes it clear that she is not. The cause of action as there expressed accrues to the widow and children if either survives. It accrues to the parents if neither widow nor child survives. It accrues to the next of kin dependent upon the employee only if there is no surviving widow, child or parent. There are, thus, three classes of possible beneficiaries. But the liability is in the alternative. It is to one of the three, not to the several classes collectively. The contention is that if the one entitled at the death of the employee to the compensation dies thereafter before a recovery, the action may be brought on behalf of the class next in line. There is no basis in the Act for such a shifting of the beneficiary. The statute does not provide for a life interest in one, with remainder over to others in the line of distribution. Nor does it provide for vesting the right to compensation in the one, with a conditional limitation to another, in case the one entitled at the death happens to die thereafter without having secured recovery.

The cause of action accrues at the death. *Reading Co. v. Kneas*, 271 U. S. 58. When it accrues, there is an immediate, final and absolute vesting, and the vesting is in that one of the several possible beneficiaries who, according to the express provision in the

statute, is declared entitled to be compensated. Upon Anderson's death, an administrator might have been appointed and an action brought immediately. If it had been so brought, it would have been for the benefit solely of the mother; and no other action would have lain. The failure to bring the action in the mother's lifetime did not result in creating a new cause of action after her death for the benefit of the sister.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.